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November 17, 2016

Ms. Heather McTeer Toney
Regional Administrator
U.S. EPA, Region 4
61 Forsyth Street, SW
Atlanta, Georgia 30303

RE: Revision to the Kentucky State Implementation Plan Relating to Excess Emissions during Startup, Shutdown, and Malfunction

Dear Ms. McTeer Toney:

On behalf of the Commonwealth of Kentucky, the Energy and Environmental Cabinet (Cabinet) respectfully submits the following revision to Kentucky's State Implementation Plan (SIP) in accordance with 40 CFR 51.102(d)(3). Kentucky is requesting to revise its SIP by removing 401 KAR 50:055, Sections 1(1) and (4) and retaining the remaining regulatory provisions as approved on May 4, 1989.[1]

In accordance with 40 CFR 51.102, the Cabinet provided public notice and the opportunity to submit written comments, as well as the opportunity to request a public hearing. A copy of the proposed revision was made available for public comment from August 15, 2016 until September 14, 2016. A copy of all comments received during the public comment period and the Cabinet's response is included with this submittal.

If you have any questions or comments concerning this matter, please contact Mr. Sean Alteri, Director of the Division for Air Quality at (502) 782-6541 or Sean.Alteri@ky.gov.

Sincerely,

Charles G. Snavely
Secretary

[1] 54 FR 19169

STATE IMPLEMENTATION PLAN REVISION

RELATING TO

PROVISIONS APPLYING TO EXCESS EMISSIONS DURING PERIODS OF STARTUP, SHUTDOWN, AND MALFUNCTION

Prepared by the
Kentucky Division for Air Quality
Submitted by
Kentucky Energy and Environment Cabinet
November 2016

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APPENDICES

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INTRODUCTION

The Energy and Environment Cabinet (Cabinet), on behalf of the Commonwealth of Kentucky, submits this revision to the Kentucky State Implementation Plan (SIP) regarding the treatment of excess emissions that occur during periods of startup, shutdown, and malfunction (SSM). The purpose of this revision to the SIP is to respond to the finding by the U.S. Environmental Protection Agency (EPA) that a provision in the Kentucky SIP is substantially inadequate to meet the requirements of the Clean Air Act (CAA).[1]

Specifically, the EPA granted a petition filed by the Sierra Club and found that Kentucky Administrative Regulation 401 KAR 50:055, General compliance requirements, Section 1(1) "…allows discretionary exemptions from otherwise applicable SIP emission limitations in Kentucky's SIP (401 KAR 50:055 § 1(1))."[2] Pursuant to Section 110(k)(5) of the CAA, whenever the EPA Administrator finds that an applicable implementation plan is inadequate to comply with the CAA, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. On May 22, 2015, the EPA issued a "SIP Call" and set a due date of November 22, 2016, for states to revise their SIPs.

To satisfy the "SIP Call", the Cabinet is requesting that the EPA approve the revision to Kentucky's SIP requesting removal of subsections 401 KAR 50:055, Section 1(1) and Section 1(4).

BACKGROUND

On May 22, 2015, the EPA took final action[3] on a petition for rulemaking filed by the Sierra Club (Petitioner) concerning how provisions in EPA-approved SIPs treat excess emissions during periods of SSM. Further, the EPA clarified, restated and revised its guidance concerning its interpretation of the CAA requirements with respect to treatment of excess emissions that occur during periods of SSM in SIPs. The EPA evaluated existing SIP provisions for the states identified in the petition, including Kentucky, for consistency with the EPA's interpretation of the CAA. The EPA issued a finding that certain SIP provisions in 36 states are substantially inadequate to meet CAA requirements and thus issued a "SIP call" for each of those 36 states, including Kentucky. The deadline for each affected state to submit its corrective SIP revision is November 22, 2016.

[1] 80 FR 33840, as published June 12, 2015, *State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction, Final Action, at 33963.*

[2] 80 FR 33840, as published June 12, 2015, *at 33963.*

[3] 80 FR 33840, as published June 12, 2015

Specifically, the EPA found language in 401 KAR 50:055, Section 1(1) to be substantially inadequate to meet CAA requirements, and the EPA thus issued a "SIP Call" with respect to this provision.[4]

The EPA, in its final rule, stated that its reasoning for making the finding of substantial inadequacy is described in section IX.E.4 of the February 2013 proposal[5] as follows:

> *The EPA believes that 401 KAR 50:055 Section 1(1) is impermissible as an unbounded director's discretion provision that makes a state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation. In the case of 401 KAR 50:055 Section 1(1), the provision authorizes the state official to make a determination that the source has met the specific criteria, and such a determination could be interpreted to excuse excess emissions during the event and could thus be read to preclude enforcement by the EPA or through a citizen suit. In addition, the provision vests a state official with the unilateral power to grant an exemption from the otherwise applicable SIP emission limitation, without any additional public process at the state or federal level. Most importantly, however, the provision authorizes a state official to create an exemption from the emission limitation, and such an exemption is impermissible in the first instance.*[6]

This SIP revision focuses on the findings detailed in the "SIP Call" issued by the EPA. The limited scope of this SIP revision is appropriate and consistent with the EPA's explanation in the June 12, 2015 Federal Register publication:

> *The SIP call promulgated by the EPA in this action applies only to the particular SIP provisions identified in this notice, and the scope of the SIP call for each state is limited to those provisions.*[7]

CRITERIA FOR DETERMINING THE COMPLETENESS OF PLAN SUBMISSIONS

Pursuant to 40 CFR Part 51, Appendix V, the following items are included in this SIP revision for review and approval by the EPA:

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[4] 80 FR 33840, as published June 12, 2015, at 33963

[5] 80 FR 33840, as published June 12, 2015, at 33963

[6] 78 FR 12459, as published February 22, 2013, *State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction, Proposed Rule*, at 12506

[7] 80 FR 33840, as published June 12, 2015, at 33880

Administrative Materials:

(a) A formal letter of submittal from the Governor's designee requesting EPA approval of the plan revision.

A formal letter of submittal from Cabinet Secretary, Charles G. Snavely, who serves as the Governor's designee for statutory submittals required by the Clean Air Act, is included and requests EPA approval of the plan revision.

(b) Evidence that the State has adopted the plan in the State code or body of regulation. That evidence shall include the date of adoption or final issuance as well as the effective date of the plan, if different from the adoption/issuance date.

A copy of 401 KAR 50:055 from the Kentucky Legislative Research Commission is included in this SIP revision in Appendix B. The version of 401 KAR 50:055 included in the Kentucky SIP and codified at 40 CFR 52, Subpart S became effective on September 22, 1982. The EPA published full approval of 401 KAR 50:055 into the Kentucky SIP on May 4, 1989, with an effective date of July 3, 1989.[8] This SIP revision removes provisions that the EPA found inadequate from the Kentucky SIP; however, the SIP revision will not affect Kentucky regulations.

(c) Evidence that the State has the necessary legal authority under State law to adopt and implement the plan.

Kentucky Revised Statutes (KRS) 224.10-100 sets forth the powers and duties of the Cabinet. Under KRS 224.10-100, the Cabinet shall have the authority, power, and duty to prepare and develop a comprehensive plan or plans related to the environment of the Commonwealth and develop and conduct a comprehensive program for the management of air resources. Further, the Cabinet shall provide for the prevention, abatement, and control of all air pollution. A copy of KRS 224.10-100 is included in Appendix A for reference purposes only, and the Cabinet is not requesting that it be adopted as part of Kentucky's SIP.

(d) A copy of the actual regulation, or document submitted for approval and incorporation by reference into the plan, including indication of the changes to be made.

A strikethrough version of 401 KAR 50:055, that details the provisions requested to be removed from the Kentucky SIP, is included in Appendix C. The Cabinet requests that the EPA remove the language found to be inadequate to comply with the CAA. Specifically, the Cabinet requests a SIP revision to remove the following subsections: 401 KAR 50:055, Section 1(1) and Section 1(4).

[8] 54 FR 19169, as published May 4, 1989.

(e) Evidence that the State followed all of the procedural requirements of the State's laws and constitution in conducting and completing the adoption/issuance of the plan revision.

The publication of the 401 KAR 50:055 in the Administrative Register of Kentucky is provided as evidence that the State followed all of the procedural requirements of the state's laws and constitution in conducting and completing the adoption and issuance of the plan with respect to language contained in 401 KAR 50:055 that will remain in Kentucky's SIP after this revision. A copy of the Administrative Register of Kentucky notice is provided as Appendix F.

(f) Evidence that public notice was given of the plan revision consistent with procedures approved by EPA, including the date of publication of such notice.

In accordance with 40 CFR 51.102, a copy of the public notice regarding this SIP revision is included in Appendix D.

(g) Certification that a public hearing was held in accordance with the information provided in the public notice, and the State's laws and constitution, if applicable, consistent with public hearing requirements contained in 40 CFR 51.102.

An official transcript of the public hearing is included in Appendix D.

(h) Compilation of public comments and the State's response thereto.

All comments received during the public comment period regarding the SIP revision are compiled and a response to each comment is provided in Appendix E.

Technical Support:

Due to the limited scope of the "SIP Call" and this subsequent SIP revision, the Cabinet finds that the requirements of 40 CFR, Appendix V to Part 51 – Criteria for Determining the Completeness of Plan Submissions, 2.2 Technical Support, may be satisfied without the formal, detailed analysis that customarily supports a request for plan revision. This approach is consistent with EPA's determination as detailed in Example 1 of Section X. Implementation Aspects of EPA's SSM SIP Policy, B. Recommendations for Compliance With Section 110(l) and Section 193 for SIP Revisions of the Federal Register:

> *Example 1: A state elects to revise an existing SIP provision by removing an existing automatic exemption provision, director's discretion provision, enforcement discretion provision or affirmative defense provision, without altering any other aspects of the SIP provision at issue (e.g., elects to retain the emission limitation for the source category but eliminate the exemption for emissions during SSM events). Although the EPA must review each SIP submission for compliance with section 110(l) and section 193 on the facts and circumstances of the revision, the Agency believes in general that this type of SIP revision should not entail a*

> *complicated analysis to meet these statutory requirements. Presumably, removal of the impermissible components of preexisting SIP provisions would not constitute backsliding, would in fact strengthen the SIP and would be consistent with the overarching requirement that the SIP revision be consistent with the requirements of the CAA. Accordingly, the EPA believes that this type of SIP revision should not entail a complicated analysis for purposes of section 110(l). If the SIP revision is also governed by section 193, then elimination of the deficiency will likewise presumably result in equal or greater emission reductions and thus comply with section 193 without the need for a more complicated analysis. The EPA has recently evaluated a SIP revision to remove specific SSM deficiencies in this manner*[9].

Specific requirements of 40 CFR Part 51, Appendix V to Part 51 – Criteria for Determining the Completeness of Plan Submissions, 2.2 Technical Support are addressed below:

(a) Identification of all regulated pollutants affected by the plan.

Due to the limited scope of the "SIP Call" and this subsequent SIP revision, the requested changes to the Kentucky SIP to address EPA's updated policy related to SSM will not result in any change in regulated pollutants affected by the Kentucky SIP.

(b) Identification of the locations of affected sources including the EPA attainment/nonattainment designation of the locations and the status of the attainment plan for the affected area(s).

Due to the limited scope of the "SIP Call" and this subsequent SIP revision, the requested changes to the Kentucky SIP to address EPA's updated policy related to SSM does not result in any change in locations of affected sources, including the EPA designations of the locations and the status of the attainment plan for the affected areas(s).

(c) Quantification of the changes in plan allowable emissions from the affected sources; estimates of changes in current actual emissions from affected sources or, where appropriate, quantification of changes in actual emissions from affected sources through calculations of the differences between certain baseline levels and allowable emissions anticipated as a result of the revision.

Due to the limited scope of the proposed "SIP Call" and this subsequent SIP revision, the requested changes to the Kentucky SIP to address EPA's updated policy related to SSM does not result in any increase in plan allowable emissions from affected sources.

[9] 80 FR 33840, as published June 12, 2015, at 33957.

(d) The State's demonstration that the national ambient air quality standards, prevention of significant deterioration increments, reasonable further progress demonstration, and visibility, as applicable, are protected if the plan is approved and implemented.

Due to the limited scope of the "SIP Call" and this subsequent SIP revision, the requested changes to the Kentucky SIP to address EPA's updated policy related to SSM will not adversely affect the national ambient air quality standards, prevention of significant deterioration increments, reasonable further progress demonstration, or visibility.

(e) Modeling information required to support the revision, including input data, output data, models used, justification of model selections, ambient monitoring data used, meteorological data used, justification for use of offsite data (where used), modes of models used, assumptions, and other information relevant to the determination of adequacy of the modeling analysis.

Due to the limited scope of the "SIP Call" and this subsequent SIP revision, the requested changes to the Kentucky SIP to address EPA's updated policy related to SSM does not require submission of additional modeling information.

(f) Evidence, where necessary, that emissions limitations are based on continuous emission reduction technology.

Due to the limited scope of the "SIP Call" and this subsequent SIP revision, the requested changes to the Kentucky SIP to address EPA's updated policy related to SSM does not require the submission of additional evidence that emissions limitations are based on continuous emission reduction technology.

(g) Evidence that the plan contains emission limitations, work practice standards and recordkeeping/reporting requirements, where necessary, to ensure emission levels.

Due to the limited scope of the "SIP Call" and this subsequent SIP revision, the requested changes to the Kentucky SIP to address EPA's updated policy related to SSM does not require submission of additional evidence that the plan contains emission limitations, work practice standards and recordkeeping/reporting requirements to ensure emission levels.

(h) Compliance/enforcement strategies, including how compliance will be determined in practice.

Due to the limited scope of the "SIP Call" and this subsequent SIP revision, the requested changes to the Kentucky SIP to address EPA's updated policy related to SSM does not require the submission of additional compliance/enforcement strategies, including new information regarding compliance determinations.

(i) Special economic and technological justifications required by any applicable EPA policies, or any explanation of why such justifications are not necessary.

Due to the limited scope of the "SIP Call" and this subsequent SIP revision, the requested changes to the Kentucky SIP to address EPA's updated policy related to SSM does not require the submission of additional special economic and technological justifications required by any applicable EPA policies, or any further explanation of why such justifications are not necessary.

CONCLUSION

The Cabinet is requesting to revise Kentucky's SIP by removing 401 KAR 50:055, Section 1(1) and Section 1(4) from its SIP in their entirety. The Cabinet determines that such action constitutes a corrective SIP revision within the scope and framework of EPA's final action of May 22, 2015. The Cabinet intends to allow these subsections to remain in 401 KAR 50:055 to be enforceable as state-origin provisions only. Therefore, the Cabinet respectfully requests that the EPA approve the revision to Kentucky's SIP by removing subsections 401 KAR 50:055, Section 1(1) and Section 1(4).

Appendix A

Federal Registers
and
KRS 224.10-100

Appendix A-1

80 FR 33840

FEDERAL REGISTER

Vol. 80 Friday,
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Part IV

Environmental Protection Agency

40 CFR Part 52
State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction; Final Rule

I. General Information

A. Does this action apply to me?

Entities potentially affected by this action include states, U.S. territories, local authorities and eligible tribes that are currently administering, or may in the future administer, EPA-approved implementation plans ("air agencies").[1] The EPA's action on the petition for rulemaking filed by the Sierra Club with the EPA Administrator on June 30, 2011 (the Petition), is potentially of interest to all such entities because the EPA is addressing issues related to basic CAA requirements for SIPs. The particular issues addressed in this rulemaking are the same issues that the Petition identified, which relate specifically to section 110 of the CAA. Pursuant to section 110, through what is generally referred to as the "SIP program," the states and the EPA together provide for implementation, maintenance and enforcement of the national ambient air quality standards (NAAQS). While recognizing similarity to (and in some instances overlap with) issues concerning other air programs, *e.g.*, concerning SSM provisions in the EPA's regulatory programs for New Source Performance Standards (NSPS) pursuant to section 111 and National Emission Standards for Hazardous Air Pollutants (NESHAP) pursuant to section 112, the EPA notes that the issues addressed in this rulemaking are specific to SSM provisions in the SIP program. Through this rulemaking, the EPA is both clarifying and applying its interpretation of the CAA with respect to SIP provisions applicable to excess emissions during SSM events in general. In addition, the EPA is issuing findings that some of the specific SIP provisions in some of the states identified in the Petition and some SIP provisions in additional states are substantially inadequate to meet CAA requirements, pursuant to CAA section 110(k)(5), and thus those states (named in section II.C of this document) are directly affected by this rulemaking. For example, where a state's existing SIP includes an affirmative defense provision that would purport to alter the jurisdiction of the federal courts to assess monetary penalties for violations of CAA requirements, then the EPA is determining that the SIP provision is substantially inadequate because the provision is inconsistent with fundamental requirements of the CAA. This action may also be of interest to the public and to owners and operators of industrial facilities that are subject to emission limitations in SIPs, because it will require changes to certain state rules applicable to excess emissions during SSM events. This action embodies the EPA's updated SSM Policy concerning CAA requirements for SIP provisions relevant to excess emissions during SSM events.

[1] The EPA respects the unique relationship between the U.S. government and tribal authorities and acknowledges that tribal concerns are not interchangeable with state concerns. Under the CAA and EPA regulations, a tribe may, but is not required to, apply for eligibility to have a tribal implementation plan (TIP). For convenience, the EPA refers to "air agencies" in this rulemaking collectively when meaning to refer in general to states, the District of Columbia, U.S. territories, local air permitting authorities and eligible tribes that are currently administering, or may in the future administer, EPA-approved implementation plans. This final action does not include action on any provisions in any TIP. The EPA therefore refers to "state" or "states" rather than "air agency" or "air agencies" when meaning to refer to the District of Columbia and/or one, some, or all of the states at issue in this rulemaking. The EPA also uses "state" or "states" rather than "air agency" or "air agencies" when quoting or paraphrasing the CAA or other document that uses that term even when the original referenced passage may have applicability to tribes as well.

B. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this document will also be available on the World Wide Web. Following signature by the EPA Administrator, a copy of this document will be posted on the EPA's Web site, under "State Implementation Plans to Address Emissions During Startup, Shutdown and Malfunction," at *http://www.epa.gov/air/urbanair/sipstatus*. The EPA's initial proposed response to the Petition in the February 2013 proposal, the EPA's revised proposed response to the Petition in the September 2014 supplemental notice of proposed rulemaking (SNPR) and the EPA's Response to Comments document may be found in the docket for this action.

C. How is the preamble organized?

The information presented in this preamble is organized as follows:

air quality standards that the EPA establishes under CAA section 109 for criteria pollutants for purposes of protecting public health and welfare.

The term *Petition* refers to the petition for rulemaking titled, "Petition to Find Inadequate and Correct Several State Implementation Plans under Section 110 of the Clean Air Act Due to Startup, Shutdown, Malfunction, and/or Maintenance Provisions," filed by the Sierra Club with the EPA Administrator on June 30, 2011.

The term *Petitioner* refers to the Sierra Club.

The term *practically enforceable* means, in the context of a SIP emission limitation, that the limitation is enforceable as a practical matter (*e.g.*, contains appropriate averaging times, compliance verification procedures and recordkeeping requirements). The term uses "practically" as it means "in a practical manner" and not as it means "almost" or "nearly." In this document, the EPA uses the term "practically enforceable" as interchangeable with the term "practicably enforceable."

The term *shutdown* means, generally, the cessation of operation of a source for any reason. In this document, the EPA uses this term in the generic sense. In individual SIP provisions it may be appropriate to include a specifically tailored definition of this term to address a particular source category for a particular purpose.

The term *SIP* means or refers to a State Implementation Plan. Generally, the SIP is the collection of state statutes and regulations approved by the EPA pursuant to CAA section 110 that together provide for implementation, maintenance and enforcement of a national ambient air quality standard (or any revision thereof) promulgated under section 109 for any air pollutant in each air quality control region (or portion thereof) within a state. In some parts of this document, statements about SIPs in general would also apply to tribal implementation plans in general even though not explicitly noted.

The term *SNPR* means the supplemental notice of proposed rulemaking that the EPA signed and posted on the Agency Web site on September 5, 2014, and published in the **Federal Register** on September 17, 2014. Supplementing the February 2013 proposal, the SNPR comprises the EPA's revised proposed response to the Petition with respect to affirmative defense provisions in SIPs.

The term *SSM* refers to startup, shutdown or malfunction at a source. It does not include periods of maintenance at such a source. An SSM event is a period of startup, shutdown or malfunction during which there may be exceedances of the applicable emission limitations and thus excess emissions.

The term *SSM Policy* refers to the cumulative guidance that the EPA has issued as of any given date concerning its interpretation of CAA requirements with respect to treatment of excess emissions during periods of startup, shutdown and malfunction at a source in SIP provisions. The most comprehensive statement of the EPA's SSM Policy prior to this final action is embodied in a 1999 guidance document discussed in more detail in this final action. That specific guidance document is referred to as the *1999 SSM Guidance*. The final action described in this document embodies the EPA's updated SSM Policy for SIP provisions relevant to excess emissions during SSM events. In section XI of this document, the EPA provides a statement of the Agency's SSM SIP Policy as of 2015.

The term *startup* means, generally, the setting in operation of a source for any reason. In this document, the EPA uses this term in the generic sense. In an individual SIP provision it may be appropriate to include a specifically tailored definition of this term to address a particular source category for a particular purpose.

II. Overview of Final Action and Its Consequences

A. Summary

The EPA is in this document taking final action on a petition for rulemaking that the Sierra Club filed with the EPA Administrator on June 30, 2011. The Petition concerns how air agency rules in EPA-approved SIPs treat excess emissions during periods of SSM of industrial source process or emission control equipment. Many of these rules were added to SIPs and approved by the EPA in the years shortly after the 1970 amendments to the CAA, which for the first time provided for the system of clean air plans that were to be prepared by air agencies and approved by the EPA. At that time, it was widely believed that emission limitations set at levels representing good control of emissions during periods of so-called "normal" operation (which, until no later than 1982, was meant by the EPA to refer to periods of operation other than during startup, shutdown, maintenance or malfunction) could in some cases not be met with the same emission control strategies during periods of startup, shutdown, maintenance or malfunction.[2] Accordingly, it was common for state plans to include provisions for special, more lenient treatment of excess emissions during such periods of startup, shutdown, maintenance or malfunction. Many of these provisions took the form of absolute or conditional statements that excess emissions from a source, when they occur during startup, shutdown, malfunction or otherwise outside of the source's so-called "normal" operations, were not to be considered violations of the air agency rules; *i.e.*, these emissions were considered exempt from legal control.

Excess emission provisions for startup, shutdown, maintenance and malfunctions were often included as part of the original SIPs that the EPA approved in 1971 and 1972. In the early 1970s, because the EPA was inundated with proposed SIPs and had limited experience in processing them, not enough attention was given to the adequacy, enforceability and consistency of these provisions. Consequently, many SIPs were approved with broad and loosely defined provisions to control excess emissions. Starting in 1977, however, the EPA discerned and articulated to air agencies that exemptions for excess emissions during such periods were inconsistent with certain requirements of the CAA.[3] The EPA also realized that such provisions allow opportunities for sources to emit pollutants during such periods repeatedly and in quantities that could cause unacceptable air pollution in nearby communities with no legal pathway within the existing EPA-approved SIP for air agencies, the EPA, the public or the courts to require the sources to make reasonable efforts to reduce these emissions. The EPA has attempted to be more careful after 1977 not to approve SIP submissions that contain illegal SSM provisions and has issued several guidance memoranda to advise states on how to avoid impermissible provisions[4] as they expand and revise their SIPs. The EPA has also found several SIPs to be deficient because of problematic SSM provisions and called upon the affected states to amend their SIPs. However, in light of the other high-priority work facing both air agencies and the EPA,

[2] Since at least 1982, however, the EPA has used the term "normal" in the SSM Policy in the ordinary sense of the word to distinguish between predictable modes of source operation such as startup and shutdown and genuine "malfunctions," which are by definition supposed to be unpredictable and unforeseen events and which could not have been precluded by proper source design, maintenance and operation. *See, e.g.*, 1982 SSM Guidance, Attachment at 2, in which the EPA states, "[s]tart-up and shutdown of process equipment are part of the normal operation of a source and should be accounted for in the design and implementation of the operating procedure for the process and control equipment." The 1982 SSM Guidance is in the rulemaking docket at EPA–HQ–OAR–2012–0322–0005.

[3] In 1977, the EPA took actions related to specific sources located in Utah and Idaho in which the EPA expressed its views regarding issues such as automatic exemptions from applicable emission limitations. *See* Memorandum, "Statutory, Regulatory, and Policy Context for this Rulemaking," at n.2, February 4, 2013, in the rulemaking docket at EPA–HQ–OAR–2012–0322–0029.

[4] The term "impermissible provision" as used throughout this document is generally intended to refer to a SIP provision that the EPA now believes to be inconsistent with requirements of the CAA. As described later in this document (*see* section VIII.A), the EPA is proposing to find a SIP "substantially inadequate" to meet CAA requirements where the EPA determines that the SIP includes an impermissible provision.

EPA reviewed for consistency with CAA requirements as part of this rulemaking.

B. What the Petitioner Requested

The Petition includes three interrelated requests concerning the treatment in SIPs of excess emissions by sources during periods of SSM.

First, the Petitioner argued that SIP provisions providing an affirmative defense for monetary penalties for excess emissions in judicial proceedings are contrary to the CAA. Thus, the Petitioner advocated that the EPA should rescind its interpretation of the CAA expressed in the SSM Policy that allows appropriately drawn affirmative defense provisions in SIPs. The Petitioner made no distinction between affirmative defenses for excess emissions related to malfunction and those related to startup or shutdown. Further, the Petitioner requested that the EPA issue a SIP call requiring states to eliminate all such affirmative defense provisions in existing SIPs. As explained later in this final document, the EPA has decided to fully grant this request. Although the EPA initially proposed to grant in part and to deny in part this request in the February 2013 proposal, a subsequent court decision concerning the legal basis for affirmative defense provisions under the CAA caused the Agency to reexamine this question. As a result, the EPA issued the SNPR to present its revised interpretation of the CAA with respect to this issue and to propose action on the Petition and on specific existing affirmative defense provisions in the SIPs of 17 states consistent with the reasoning of that court decision. In this final action, the EPA is revising its SSM Policy with respect to affirmative defenses for violations of SIP requirements. The EPA believes that SIP provisions that function to alter the jurisdiction of the federal courts under CAA section 113 and section 304 to determine liability and to impose remedies are inconsistent with fundamental legal requirements of the CAA, especially with respect to the enforcement regime explicitly created by statute.

Second, the Petitioner argued that many existing SIPs contain impermissible provisions, including automatic exemptions from applicable emission limitations during SSM events, director's discretion provisions that in particular provide discretionary exemptions from applicable emission limitations during SSM events, enforcement discretion provisions that appear to bar enforcement by the EPA or citizens for such excess emissions and inappropriate affirmative defense provisions that are not consistent with the CAA or with the recommendations in the EPA's SSM Policy. The Petitioner identified specific provisions in SIPs of 39 states that it considered inconsistent with the CAA and explained the basis for its objections to the provisions. As explained later in this final document, the EPA agrees with the Petitioner that some of these existing SIP provisions are legally impermissible and thus finds such provisions "substantially inadequate" [10] to meet CAA requirements. Among the reasons for the EPA's action is to eliminate SIP provisions that interfere with enforcement in a manner prohibited by the CAA. Simultaneously, where the EPA agrees with the Petitioner, the EPA is issuing a SIP call that directs the affected state to revise its SIP accordingly. For the remainder of the identified provisions, however, the EPA disagrees with the contentions of the Petitioner and is thus denying the Petition with respect to those provisions and taking no further action. The EPA's action issuing the SIP calls on this portion of the Petition will assure that these SIPs comply with the fundamental requirements of the CAA with respect to the treatment of excess emissions during periods of SSM. The majority of the state-specific provisions affected by this SIP call action are inconsistent with the EPA's longstanding interpretation of the CAA through multiple iterations of its SSM Policy. With respect to SIP provisions that include an affirmative defense for violations of SIP requirements, however, the EPA has revised its prior interpretation of the statute that would have allowed such provisions under certain very limited conditions. Based upon an evaluation of the relevant statutory provisions in light of more recent court decisions, the EPA is issuing a SIP call to address existing affirmative defense provisions that would operate to alter or eliminate the jurisdiction of courts to assess liability and impose remedies and that would thereby contradict explicit provisions of the CAA relating to judicial authority.

Third, the Petitioner argued that the EPA should not rely on interpretive letters from states to resolve any ambiguity, or perceived ambiguity, in state regulatory provisions in SIP submissions. The Petitioner reasoned that all regulatory provisions should be clear and unambiguous on their face and that any reliance on interpretive letters to alleviate facial ambiguity in SIP provisions can lead to later problems with compliance and enforcement. Extrapolating from several instances in which the basis for the original approval of a SIP provision related to excess emissions during SSM events was arguably not clear, the Petitioner contended that the EPA should never use interpretive letters to resolve such ambiguities. As explained later in this proposal, the EPA acknowledges the concern of the Petitioner that provisions in SIPs should be clear and unambiguous. However, the EPA does not agree with the Petitioner that reliance on interpretive letters in a rulemaking context is never appropriate. Without the ability to rely on a state's interpretive letter that can in a timely way clarify perceived ambiguity in a provision in a SIP submission, however small that ambiguity may be, the EPA may have no recourse other than to disapprove the state's SIP submission. Thus, the EPA is denying the request that actions on SIP submissions never rely on interpretive letters. Instead, the EPA explains how proper documentation of reliance on interpretive letters in notice-and-comment rulemaking nevertheless addresses the practical concerns of the Petitioner.

C. To which air agencies does this rulemaking apply and why?

In general, the final action may be of interest to all air agencies because the EPA is clarifying, restating and revising its longstanding SSM Policy with respect to what the CAA requires concerning SIP provisions relevant to excess emissions during periods of SSM. For example, the EPA is granting the Petitioner's request that the EPA rescind its prior interpretation of the CAA that, as stated in prior guidance in the SSM Policy, allowed appropriately drawn affirmative defense provisions applicable to malfunctions. The EPA is also reiterating, clarifying or revising its prior guidance with respect to several other issues related to SIP provisions applicable to SSM events in order to ensure that future SIP submissions, not limited to those that affected states make in response to this action, are fully consistent with the CAA. For example, the EPA is reiterating and clarifying its prior guidance concerning how states may elect to replace existing exemptions for excess emissions during SSM events with properly developed alternative emission limitations that apply to the affected sources during startup, shutdown or other normal modes of source operation (*i.e.*, that apply to excess emissions during those normal modes of operation as opposed to during malfunctions). This action also

[10] The term "substantially inadequate" is used in the CAA and is discussed in detail in section VIII.A of this document.

NAAQS, protect prevention of significant deterioration (PSD) increments and improve visibility. Equally importantly, the EPA believes that the same provisions may undermine the ability of states, the EPA and the public to enforce emission limitations in the SIP that have been relied upon to ensure attainment or maintenance of the NAAQS or to meet other CAA requirements.

For each state for which the final action on the Petition is either "Grant" or "Partially grant, partially deny," the EPA is also in this final action calling for a SIP revision as necessary to correct the identified deficient provisions. The SIP revisions that the states are directed to make will rectify a number of different types of defects in existing SIPs, including automatic exemptions from emission limitations, impermissible director's discretion provisions, enforcement discretion provisions that have the effect of barring enforcement by the EPA or through a citizen suit and affirmative defense provisions that are inconsistent with CAA requirements. A corrective SIP revision addressing automatic or impermissible discretionary exemptions will ensure that excess emissions during periods of SSM are treated in accordance with CAA requirements. Similarly, a corrective SIP revision addressing ambiguity in who may enforce against violations of these emission limitations will also ensure that CAA requirements to provide for enforcement are met. A SIP revision to remove affirmative defense provisions will assure that the SIP provision does not purport to alter or eliminate the jurisdiction of federal courts to assess liability or to impose remedies consistent with the statutory authority provided in CAA section 113 and section 304. The particular provisions for which the EPA is requiring SIP revisions are summarized in section IX of this document. Many of these provisions were added to the respective SIPs many years ago and have not been the subject of action by the state or the EPA since.

For each of the states for which the EPA is denying or is partially denying the Petition, the EPA finds that the particular provisions identified by the Petitioner are not substantially inadequate to meet the requirements pursuant to CAA section 110(k)(5), because the provisions: (i) Are, as they were described in the Petition and as they appear in the existing SIP, consistent with the requirements of the CAA; or (ii) are, as they appear in the existing SIP after having been revised subsequent to the date of the Petition, consistent with the requirements of the CAA; or (iii) have, subsequent to the date of the Petition, been removed from the SIP. Thus, in this final action, the EPA is taking no action to issue a SIP call with respect to those states for those particular SIP provisions.

In addition to evaluating specific SIP provisions identified in the Petition, the EPA has independently evaluated additional affirmative defense provisions in the SIPs of six states (applicable in nine statewide and local jurisdictions).[12] As explained in the SNPR, the EPA determined that this approach was necessary in order to take into consideration recent judicial decisions concerning affirmative defense provisions and CAA requirements. As the result of this evaluation, the EPA finds that specific affirmative defense provisions in 17 states (applicable in 23 statewide and local jurisdictions) are substantially inadequate to meet CAA requirements for the reason that these provisions impinge upon the statutory jurisdiction of the federal courts to determine liability and impose remedies for violations of SIP emission limitations.[13] By improperly impinging upon the jurisdiction of the federal courts, the EPA believes, these provisions fail to meet fundamental statutory requirements intended to attain and maintain the NAAQS, protect PSD increments and improve visibility. As with the affirmative defense provisions identified in the Petition, the EPA believes that these provisions may undermine the ability of states, the EPA and the public to enforce emission limitations in the SIP that have been relied upon to ensure attainment or maintenance of the NAAQS or to meet other CAA requirements.

In this final action, the EPA is issuing a SIP call to each of 36 states (for provisions applicable in 45 statewide and local jurisdictions) with respect to these provisions. The 36 states are listed in table 2, "List of All States With SIP Provisions Subject to SIP Call." The EPA emphasizes that this SIP call action pertains to the specific SIP provisions identified and discussed in section IX of this document. The actions required of individual states in response to this SIP call action are discussed in more detail in section IX of this action.

TABLE 2—LIST OF ALL STATES WITH SIP PROVISIONS SUBJECT TO SIP CALL

EPA region	State	Area
I	Maine	State.
	Rhode Island	State.
II	New Jersey	State.
III	Delaware	State.
	District of Columbia	State.
	Virginia	State.
	West Virginia	State.
IV	Alabama	State.
	Florida	State.
	Georgia	State.
	Kentucky	State.

[12] The six states in which the EPA independently evaluated affirmative defense provisions are: California; South Carolina, New Mexico, Texas, Washington and West Virginia. The EPA evaluated the New Mexico SIP with respect to provisions applicable to the state and Albuquerque-Bernalillo County. The EPA evaluated the Washington SIP with respect to provisions applicable to the state, the Energy Facility Site Evaluation Council and the Southwest Clean Air Agency.

[13] The 17 states for which the EPA finds that specific affirmative defense provisions are substantially inadequate to meet CAA requirements are counted as follows: The EPA evaluated affirmative defense provisions identified by the Petitioner for 14 states: Alaska; Arizona; Arkansas; Colorado; District of Columbia; Georgia; Illinois; Indiana; Kentucky; Michigan; Mississippi; New Mexico; Virginia; and Washington. The EPA evaluated affirmative defense provisions that it independently identified among two states identified by the Petitioner: South Carolina; and West Virginia. Further, the EPA independently identified and evaluated affirmative defense provisions in two states that were not included in the Petition: California; and Texas. In the final action, the EPA is finding one or more affirmative defense provisions to be substantially inadequate in all but one of the 18 states for which the EPA evaluated affirmative defense provisions; for one state, Kentucky, the affirmative defense provision, which was applicable in Jefferson County, was corrected prior to the EPA's issuing its SNPR.

whether and how it would potentially have to change its equipment or practices in order to operate with emissions that comply with the revised SIP, will depend on the nature and frequency of the source's SSM events and how the state has chosen to revise the SIP to address excess emissions during SSM events. The EPA did not conduct an analysis that would indicate, *e.g.*, how many owners or operators of sources in each affected state would likely change any procedures or processes for control of emissions from those sources during periods of SSM. The impacts of revised SIP provisions will be unique to each affected state and its particular mix of affected sources, and thus the EPA cannot predict what those impacts might be. Furthermore, the EPA does not believe the results of such analysis, had one been conducted, would significantly affect this rulemaking that pertains to whether SIP provisions comply with CAA requirements. The EPA recognizes that after all the responsive SIP revisions are in place and are being implemented by the states, some sources may need to take steps to control emissions better so as to comply with emission limitations continuously, as required by the CAA, or to increase durability of components and monitoring systems to detect and manage malfunctions promptly.

The EPA Regional Offices will work with states to help them understand their options and the potential consequences for sources as the states prepare their SIP revisions in response to this SIP call.

F. What happens if an affected state fails to meet the SIP submission deadline?

If, in the future, the EPA finds that a state that is subject to this SIP call action has failed to submit a complete SIP revision as required, or the EPA disapproves such a SIP revision, then the finding or disapproval would trigger an obligation for the EPA to impose a federal implementation plan (FIP) within 24 months after that date. That FIP obligation would be discharged without promulgation of a FIP only if the state makes and the EPA approves the called-for SIP submission. In addition, if a state fails to make the required SIP revision, or if the EPA disapproves the required SIP revision, then either event can also trigger mandatory 18-month and 24-month sanctions clocks under CAA section 179. The two sanctions that apply under CAA section 179(b) are the 2-to-1 emission offset requirement for all new and modified major sources subject to the nonattainment new source review (NSR) program and restrictions on highway funding. More details concerning the timing and process of the SIP call, and potential consequences of the SIP call, are provided in section VIII of this document.

G. What is the status of SIP provisions affected by this SIP call action in the interim period starting when the EPA promulgates the final SIP call and ending when the EPA approves the required SIP revision?

When the EPA issues a final SIP call to a state, that action alone does not cause any automatic change in the legal status of the existing affected provision(s) in the SIP. During the time that the state takes to develop a SIP revision in response to the SIP call and the time that the EPA takes to evaluate and act upon the resulting SIP submission from the state pursuant to CAA section 110(k), the existing affected SIP provision(s) will remain in place. The EPA notes, however, that the state regulatory revisions that the state has adopted and submitted for SIP approval will most likely be already in effect at the state level during the pendency of the EPA's evaluation of and action upon the new SIP submission.

The EPA recognizes that in the interim period, there may continue to be instances of excess emissions that adversely affect attainment and maintenance of the NAAQS, interfere with PSD increments, interfere with visibility and cause other adverse consequences as a result of the impermissible provisions. The EPA is particularly concerned about the potential for serious adverse consequences for public health in this interim period during which states, the EPA and sources make necessary adjustments to rectify deficient SIP provisions and take steps to improve source compliance. However, given the need to resolve these longstanding SIP deficiencies in a careful and comprehensive fashion, the EPA believes that providing sufficient time consistent with statutory constraints for these corrections to occur will ultimately be the best course to meet the ultimate goal of eliminating the inappropriate SIP provisions and replacing them with provisions consistent with CAA requirements.

III. Statutory, Regulatory and Policy Background

The Petition raised issues related to excess emissions from sources during periods of SSM and the correct treatment of these excess emissions in SIPs. In this context, "excess emissions" are air emissions that exceed the otherwise applicable emission limitations in a SIP, *i.e.*, emissions that would be violations of such emission limitations. The question of how to address excess emissions correctly during SSM events has posed a challenge since the inception of the SIP program in the 1970s. The primary objective of state and federal regulators is to ensure that sources of emissions are subject to appropriate emission controls as necessary in order to attain and maintain the NAAQS, protect PSD increments, improve visibility and meet other statutory requirements. Generally, this is achieved through enforceable emission limitations on sources that apply, as required by the CAA, continuously.

Several key statutory provisions of the CAA are relevant to the EPA's evaluation of the Petition. These provisions relate generally to the basic legal requirements for the content of SIPs, the authority and responsibility of air agencies to develop such SIPs and the EPA's authority and responsibility to review and approve SIP submissions in the first instance, as well as the EPA's authority to require improvements to a previously approved SIP if the EPA later determines that to be necessary for a SIP to meet CAA requirements. In addition, the Petition raised issues that pertain to enforcement of provisions in a SIP. The enforcement issues relate generally to what constitutes a violation of an emission limitation in a SIP, who may seek to enforce against a source for that violation, and whether the violator should be subject to monetary penalties as well as other forms of judicial relief for that violation.

The EPA has a longstanding interpretation of the CAA with respect to the treatment of excess emissions during periods of SSM in SIPs. This statutory interpretation has been expressed, reiterated and elaborated upon in a series of guidance documents issued in 1982, 1983, 1999 and 2001. In addition, the EPA has applied this interpretation in individual rulemaking actions in which the EPA: (i) Approved SIP submissions that were consistent with the EPA's interpretation; [14] (ii) disapproved SIP submissions that were not consistent with this interpretation; [15] (iii) itself promulgated regulations in FIPs that were consistent

[14] *See* "Approval and Promulgation of Implementation Plans; Texas; Excess Emissions During Startup, Shutdown, Maintenance, and Malfunction Activities," 75 FR 68989 (November 10, 2010).

[15] *See* "Approval and Promulgation of State Implementation Plans; Michigan," 63 FR 8573 (February 20, 1998).

Second, in reliance on CAA section 113(e)(1), the Petitioner argued that in a judicial enforcement action in a district court, the statute explicitly specifies a list of factors that the court is to consider in assessing penalties.[29] The Petitioner argued that the EPA's SSM Policy authorizes states to create affirmative defense provisions with criteria for monetary penalties that are inconsistent with the factors that the statute specifies and that the statute explicitly directs courts to weigh in any judicial enforcement action. By specifying particular factors for courts to consider, the Petitioner reasoned, Congress has already definitively spoken to the question of what factors are germane in assessing monetary penalties under the CAA for violations. The Petitioner concluded that the EPA has no authority to allow a state to include an affirmative defense provision in a SIP with different criteria to be considered in awarding monetary penalties because "[p]reventing the district courts from considering these statutory factors is not a permissible interpretation of the Clean Air Act." [30] A more detailed explanation of the Petitioner's arguments appears in the 2013 February proposal.[31]

B. What the EPA Proposed

In the February 2013 proposal, consistent with its interpretation of the Act at that time, the EPA proposed to deny in part and to grant in part the Petition with respect to this overarching issue. As a revision to the SSM Policy as embodied in the 1999 SSM Guidance, the EPA proposed a distinction between affirmative defenses for unplanned events such as malfunctions and planned events such as startup and shutdown. The EPA explained the basis for its initial proposed action in detail, including why the Agency then believed that there was a statutory basis for narrowly drawn affirmative defense provisions that met certain criteria applicable to malfunction events but no such statutory basis for affirmative defense provisions applicable to startup and shutdown events. In the February 2013 proposal, the EPA also proposed to deny in part and to grant in part the Petition with respect to specific affirmative defense provisions in the SIPs of various states identified in the Petition consistent with that interpretation. With respect to these specific existing SIP provisions, the EPA distinguished between those provisions that were consistent with the Agency's interpretation of the CAA as set forth in 1999 SSM Guidance and were limited to malfunction events and other affirmative defense provisions that were not limited to malfunctions or otherwise not consistent with the Agency's interpretation of the CAA and included one or more deficiencies.

Subsequent to the February 2013 proposal, however, a judicial decision by the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *NRDC* v. *EPA* concerning the legal basis for affirmative defense provisions in the EPA's own regulations caused the Agency to reconsider the legal basis for any affirmative defense provisions in SIPs, regardless of the type of events to which they apply, the criteria they may contain or the types of judicial remedies they purport to limit or eliminate.[32] Thus, the EPA issued an SNPR to revise its proposed response to the Petition with respect to whether affirmative defense provisions in SIPs are consistent with fundamental legal requirements of the CAA.[33] In the SNPR, the EPA also revised its proposed response related to each of the specific affirmative defense provisions identified in the Petition. Changes to the proposed response included revision of the basis for the proposed finding of substantial inadequacy for many of the provisions (to incorporate the EPA's revised interpretation of the CAA into that basis). Other changes to the proposed response included reversal of the proposed denial of the Petition for some provisions that the Agency previously believed to be consistent with CAA requirements but subsequently determined were not authorized by the Act under the analysis prompted by the *NRDC* v. *EPA* decision. In order to provide comprehensive guidance to all states concerning affirmative defense provisions in SIPs and to avoid confusion that may arise due to recent court decisions relevant to such provisions under the CAA, the EPA also addressed additional existing SIP affirmative defense provisions of which it was aware although the provisions were not specifically identified in the Petition. The EPA initially examined the specific affirmative defense provisions identified by the Petitioner in 14 states but subsequently broadened its review to include additional provisions in four states, including two states that were not included in the Petition. Most importantly, the EPA provided a detailed explanation in the SNPR as to why it now believes that the logic of the court in the *NRDC* v. *EPA* decision vacating the affirmative defense in an Agency emission limitation under CAA section 112 likewise extends to affirmative defense provisions in SIPs.

C. What Is Being Finalized in This Action

The EPA is taking final action to grant the Petition on the request to rescind its SSM Policy element that interpreted the CAA to allow states to elect to create affirmative defense provisions in SIPs. The EPA is also taking final action to grant the Petition on the request to make a finding of substantial inadequacy and to issue SIP calls for specific existing SIP provisions that include an affirmative defense as identified in the SNPR. The specific SIP provisions at issue are discussed in section IX of this document. These existing affirmative defense provisions include some provisions that the EPA had previously determined were consistent with the CAA as interpreted in the 1999 SSM Guidance and other provisions that were not consistent even with that interpretation of the CAA. As explained in the SNPR, the EPA has now concluded that the enforcement structure of the CAA, embodied in section 113 and section 304, precludes any affirmative defense provisions that would operate to limit a court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action. These provisions are not appropriate under the CAA, no matter what type of event they apply to, what criteria they contain or what forms of remedy they purport to limit or eliminate.

The EPA is revising its interpretation of the CAA with respect to affirmative defenses based upon a reevaluation of the statutory provisions that pertain to enforcement of SIP provisions in light of recent court opinions. Section 113(b) provides courts with explicit jurisdiction to determine liability and to impose remedies of various kinds, including injunctive relief, compliance orders and monetary penalties, in judicial enforcement proceedings. This grant of jurisdiction comes directly from Congress, and the EPA is not authorized to alter or eliminate this jurisdiction under the CAA or any other law. With respect to monetary penalties, CAA section 113(e) explicitly includes the factors that courts and the EPA are required to consider in the event of judicial or administrative enforcement for violations of CAA requirements, including SIP provisions. Because Congress has already given federal courts the jurisdiction to determine

[29] Petition at 11.

[30] Petition at 11.

[31] *See* February 2013 proposal, 78 FR 12459 at 12468 (February 22, 2013).

[32] *See NRDC* v. *EPA*, 749 F.3d 1055 (D.C. Cir. 2014).

[33] *See* SNPR, 79 FR 55919 (September 17, 2014).

that courts may impose upon them in such enforcement actions, based upon the facts and circumstances of the event.

D. Response to Comments Concerning Affirmative Defense Provisions in SIPs

The EPA received numerous comments concerning the portion of the Agency's proposed response to the Petition in the February 2013 proposal that addressed the question of whether affirmative defense provisions are consistent with CAA requirements for SIPs. As explained in the SNPR, those particular comments submitted on the original February 2013 proposal are no longer germane, given that the EPA has substantially revised its initial proposed action on the Petition and its basis, both with respect to the overarching issue of whether such provisions are valid in SIPs under the CAA and with respect to specific affirmative defense provisions in existing SIPs of particular states. Accordingly, as the EPA indicated in the SNPR, it considers those particular comments on the February 2013 proposal no longer relevant and has determined that it is not necessary to respond to them. Concerning affirmative defense provisions, the appropriate focus of this rulemaking is on the comments that addressed the EPA's revised proposal in the SNPR.

With respect to the revised proposal concerning affirmative defense provisions in the SNPR, the EPA received numerous comments, some supportive and some critical of the Agency's proposed action on the Petition as revised in the SNPR. Many of these comments raised conceptual issues and arguments concerning the EPA's revised interpretation of the CAA with respect to affirmative defense provisions in SIPs in light of the *NRDC* v. *EPA* decision and concerning the EPA's application of that interpretation to specific affirmative defense provisions discussed in the SNPR. For clarity and ease of discussion, the EPA is responding to these overarching comments, grouped by issue, in this section of this document.

1. Comments that the EPA is misapplying the decision of the D.C. Circuit in *NRDC* v. *EPA* to SIP provisions because the decision only applies to the Agency's own regulations pursuant to CAA section 112.

Comment: Many commenters stated that the EPA's reliance on the D.C. Circuit's decision in *NRDC* v. *EPA* is misplaced in the SNPR because the opinion is limited to disapproval of a Maximum Achievable Control Technology (MACT) standard's affirmative defense for unavoidable malfunctions. The commenters noted that the *NRDC* v. *EPA* decision did not address the issue of affirmative defense provisions in SIPs. The commenters argued that the D.C. Circuit's opinion only stands for the narrow proposition that the EPA may not include an affirmative defense to civil penalties in a NESHAP [37] under CAA section 112.

One commenter noted that the EPA, in the SNPR, stated that the *NRDC* v. *EPA* decision did not turn on any factors specific to CAA section 112 as support for the EPA applying the decision to SIPs. However, the commenter argued that this fact is not probative because neither party raised any argument specific to CAA section 112 and it is reasonable for a court to limit its analysis to the arguments presented before it.

One commenter also noted that the EPA is not bound to apply D.C. Circuit law to actions reviewable in other circuits.

Response: As explained in the SNPR, the EPA believes the reasoning of the court in the *NRDC* v. *EPA* decision indicates that states, like the EPA, have no authority in SIP provisions to alter the jurisdiction of federal courts to assess penalties for violations of CAA requirements through affirmative defense provisions.[38] If states lack authority under the CAA to alter the jurisdiction of the federal courts through affirmative defense provisions in SIPs, then the EPA lacks authority to approve any such provision in a SIP.

The EPA agrees with the commenters' statement that the *NRDC* v. *EPA* decision pertained to a challenge to the EPA's NESHAP regulations issued pursuant to CAA section 112 to regulate hazardous air pollutants (HAPs) from sources that manufacture Portland cement. However, the EPA disagrees with the commenters' contention that, because the *NRDC* v. *EPA* decision was based on a NESHAP, it is somehow inappropriate for the EPA to rely on the reasoning of the D.C. Circuit's decision as a basis for this action.

As acknowledged by a commenter, the EPA explained in the SNPR that the *NRDC* v. *EPA* decision did not turn on the specific provisions of CAA section 112.[39] However, the commenter missed the importance of this point. Although the *NRDC* v. *EPA* decision analyzed the legal validity of an affirmative defense provision created by the EPA in conjunction with a specific NESHAP, the court based its decision upon the provisions of sections 113 and 304. Sections 113 and 304 pertain to enforcement of the CAA requirements more broadly, including to enforcement of SIP requirements. The court addressed section 112 and not sections germane specifically to SIPs, as only that section was before it. The EPA has applied the *NRDC* court's analysis to sections 113 and 304 with respect to SIPs and has concluded that the *NRDC* court's analysis is the better reading of the statutory provisions.

The affirmative defense provision in the Portland Cement NESHAP required the source to prove, by a preponderance of the evidence in an enforcement proceeding, that the source met specific criteria concerning the nature of the event. These specific criteria required to establish the affirmative defense in the Portland Cement NESHAP are functionally the same as the criteria that the EPA previously recommended to states for SIP provisions in the 1999 SSM Guidance and that the EPA repeated in the February 2013 proposal document. Accordingly, the EPA believes that the opinion of the court in *NRDC* v. *EPA* has significant impacts on the Agency's SSM Policy with respect to affirmative defense provisions. The reasoning by the *NRDC* court, as logically extended to SIP provisions, indicates that neither states nor the EPA have authority to alter either the rights of other parties to seek relief or the jurisdiction of federal courts to impose relief for violations of CAA requirements in SIPs. The EPA believes that the court's decision in *NRDC* v. *EPA* compelled the Agency to reevaluate its interpretation of the CAA as described in the SNPR.

The EPA also disagrees with commenters who suggested that a decision of the D.C. Circuit should have no bearing on actions that affect states in other circuit courts. The CAA vests authority with the D.C. Circuit to review nationally applicable regulations and any action of nationwide scope or effect. Accordingly, any decision of the D.C. Circuit in conducting such review is binding nationwide with respect to the action under review, and the D.C. Circuit's reasoning is also binding with respect to review of future EPA actions raising the same issues that will be subject to review within that Circuit. Given that the EPA has determined that this action has nationwide scope and effect, it is subject to exclusive review in the D.C. Circuit, so the EPA believes it is appropriate to apply the reasoning

[37] The NESHAPs are found in 40 CFR part 61 and 40 CFR part 63. The NESHAPs promulgated after the 1990 CAA Amendments are found in 40 CFR part 63. These standards require application of technology-based emissions standards referred to as Maximum Achievable Control Technology (MACT). Consequently, these post-1990 NESHAPs are also referred to as MACT standards.

[38] *See* 79 FR 55929–30; 55931–34.

[39] SNPR, 79 FR 55919 at 55932.

or conditional based upon the criteria of an affirmative defense, are inconsistent with the requirement for continuous controls on sources.

Finally, the EPA believes that the commenters' premise that an affirmative defense provision merely defines what a violation is also runs afoul of other fundamental requirements for SIP provisions. To the extent any such provision would allow state personnel to decide, unilaterally, whether excess emissions during an SSM event constitute a violation (*e.g.*, through application of an "affirmative defense"), this would interfere with the ability of the EPA or other parties to enforce for violations of SIP requirements. The EPA interprets the CAA to prohibit SIP provisions that impose the enforcement discretion decisions of a state on other parties. This includes provisions that are structured or styled as an affirmative defense but in effect allow *ad hoc* conditional exemptions from emission limitations and preclude enforcement for excess emission during SSM events.

5. Comments that the *NRDC* v. *EPA* decision, which concerned an emission limitation under section 112, does not apply in the context of section 110, because section 110 affords states flexibility in how to develop emission limitations in SIP provisions.

Comment: Commenters argued that the EPA's extension of the logic of the *NRDC* v. *EPA* decision to affirmative defenses in SIP provisions is incorrect because the EPA's NESHAP standards are governed by section 112, whereas SIP provisions are governed by section 110. Under the latter, commenters asserted, states are afforded wide discretion in how to develop emission limitations.[43] The commenters stated that section 110 governs the development of state SIPs to satisfy the NAAQS, which may address many different types of sources, major and minor, industrial and non-industrial, small and large, and old and new. The commenters alleged that states have independent authority to include affirmative defenses in SIP provisions, so long as the provisions are otherwise approvable, because the state has met its section 110 planning responsibilities and the SIP is enforceable.

Response: The EPA agrees with the commenters that section 110 governs the development of state SIPs and that states are accorded great discretion in determining how to meet CAA requirements in SIPs. However, as explained in the February 2013 proposal, the SNPR and sections IV.D.13 and V.D.2 of this document, states are obligated to develop SIP provisions that meet fundamental CAA requirements. The EPA has the responsibility to review SIP provisions developed by states to ensure that they in fact meet fundamental CAA requirements. As explained in the SNPR and this document, the EPA no longer believes that affirmative defense provisions meet CAA requirements. Based on the logic of the court in the *NRDC* v. *EPA* decision, the better reading of the statute is that such provisions have the effect of limiting or eliminating the statutory jurisdiction of the courts to determine liability or impose remedies.

The EPA also disagrees with the commenters' arguments that "emission limitations" under section 112 and section 110 are not comparable with respect to meeting fundamental CAA requirements. As an initial matter, both section 112 MACT standards and section 110 SIP emission limitations can be composed of various elements that include, among other things, numerical emission limitations, work practice standards and monitoring and recordkeeping requirements. However, whether there are other components that are part of the emission limitation to make it apply continuously is not relevant for purposes of determining whether an affirmative defense provision that provides relief from penalties for a violation of either a MACT standard under section 112 or a SIP provision under section 110 is consistent with the CAA.

As explained in the SNPR, the EPA has revised its interpretation of the CAA with respect to affirmative defense provisions in SIPs, based upon the logic of the court in the *NRDC* v. *EPA* decision. Section 304(a) sets forth the basis for a civil enforcement action and section 113(a)(1) does the same for administrative or judicial enforcement actions brought by the EPA. Sections 113(b) and 304(a) provide the federal district courts with jurisdiction to hear civil enforcement cases. Furthermore, section 113(e) confers jurisdiction on the district court in a civil enforcement case to determine the amount of penalty to be assessed where a violation has been established.

6. Comments that the *NRDC* v. *EPA* decision does not pertain to the appropriateness of affirmative defense provisions in the context of state administrative or civil enforcement.

Comment: Some commenters noted that the *NRDC* court only reviewed whether affirmative defense provisions could be used to limit CAA citizen suit remedies in judicial enforcement actions. The commenters alleged that the use of an affirmative defense in a citizen suit under federal regulations does not dictate the appropriateness of similar provisions in the context of state administrative or civil actions. According to the commenters, a SIP represents an air quality management system and the state administrative process is distinct from federal citizen suits. Similarly, the commenters believed that SIP emission limitations are enforceable via state regulation penalty provisions that are separate from the CAA civil penalty provisions. Because the *NRDC* court spoke only to the appropriateness of affirmative defense provisions in the context of federal citizen suits, the commenters asserted, the decision is inapplicable in the EPA's SIP call action.

Response: The EPA agrees that the court in the *NRDC* v. *EPA* decision did not speak directly to the issue of whether states can establish affirmative defenses to be used by sources exclusively in state administrative enforcement actions or in judicial enforcement in state courts. The reasoning of the *NRDC* court indicates only that such provisions would be inconsistent with the CAA in the context of judicial enforcement of SIP requirements in federal court. Indeed, the *NRDC* court suggested that if the EPA elected to consider factors comparable to the affirmative defense criteria in its own administrative enforcement proceedings, it may be able to do so. The implication of the commenters, however, is that the EPA should interpret the CAA to allow affirmative defenses in SIP provisions, so long as it is unequivocally clear that sources cannot assert the affirmative defenses in federal court enforcement actions and cannot assert the affirmative defenses in enforcement actions brought by any party other than the state.

The EPA of course agrees that states can exercise their own enforcement discretion and elect not to bring an enforcement action or seek certain remedies, using criteria analogous to an affirmative defense. It does not follow, however, that states can impose this enforcement discretion on other parties by adopting SIP provisions that would apply in federal judicial enforcement, or in enforcement brought by the EPA or other parties. To the extent that the state developed an "enforcement discretion" type provision that applied only in its own administrative enforcement actions or only with respect to enforcement actions brought by the state in state courts, such a provision may be appropriate. This authority is not unlimited because the state could not create affirmative defense provision that in effect undermines its legal authority

[43] *See, e.g., Train* v. *NRDC*, 421 U.S. 60, 79 (1975).

the CAA to permit narrowly drawn affirmative defenses applicable only to penalties and has explained why it now believes that the reasoning of the court in the *NRDC* v. *EPA* decision is the better reading of the CAA.

Some commenters allege that the Fifth Circuit considered and rejected the legal arguments articulated by the EPA in the SNPR to support the Agency's new interpretation that affirmative defenses in SIP provisions are inconsistent with the Act. The EPA disagrees with commenters' assertions. As explained above, in the *Luminant Generation* v. *EPA* decision the Fifth Circuit analyzed the EPA's former interpretation of the CAA under step 2 of *Chevron* and found that the Agency's position was reasonable. The Fifth Circuit held that the CAA did not dictate the outcome put forth by environmental petitioners in the *Luminant Generation* v. *EPA* case; the court did not hold that the Agency could not reasonably interpret the CAA provisions at issue to come to the new position articulated in the SNPR and other sections of this document. In fact, the Fifth Circuit upheld the EPA's reading of the statute to preclude affirmative defense provisions for planned events in the same decision as a reasonable interpretation of the CAA.

In the SNPR, the EPA also addressed the discussion in the *NRDC* v. *EPA* decision that referred to the earlier *Luminant Generation* v. *EPA* decision and explained its view that the court in *NRDC* v. *EPA* did not suggest that its interpretation of the CAA would not apply more broadly to SIP provisions. Rather, the court simply declined to address that issue. As to commenters' allegation that the EPA should follow the *Luminant* court's reasoning because that court addressed the specific issue of affirmative defenses in SIP provisions, the EPA has explained in detail in the SNPR and section IV.D.1 of this document why it now believes that the *NRDC* court's reasoning is applicable here and why it believes this is the better interpretation of sections 113 and 304.

The EPA acknowledges that other circuit courts have also upheld affirmative defense provisions promulgated by the Agency in FIPs.[51] Those decisions were also based upon an interpretation of the CAA that the Agency no longer holds. The EPA further notes that the affirmative defense provisions at issue in the other court decisions cited by the commenters are not at issue in this action. However, the EPA may elect to address these provisions in a separate rulemaking.

The EPA also disagrees with commenters' allegations that this final SIP call action violates the mandate rule. The mandate rule generally governs how a lower court handles a higher court's decision on remand. The Agency believes that the mandate rule is inapplicable here. Similarly, the Agency believes that the principles of *res judicata,* judicial estoppel and collateral estoppel (issue preclusion) raised by commenters are all inapplicable in this situation. For reasons the EPA has fully explained in this rulemaking, the Agency is adopting a revised interpretation of the CAA. This necessarily changes the issues or claims that may be raised in any future litigation concerning the Agency's action here or subsequent Agency actions taken pursuant to this changed interpretation. As noted previously, the Agency's ability to change its interpretation of the statute is well established, even if courts have previously upheld the Agency's former interpretation as reasonable under step 2 of the *Chevron* analysis.

8. Comments that affirmative defense provisions are needed or appropriate because sources cannot control malfunctions or the excess emissions that occur during them.

Comment: Several commenters claimed that by requiring states to remove affirmative defense provisions, the EPA will create a situation where sources have no potential relief from liability for exceedances resulting from excess emissions during malfunctions. The commenters argued that this will effectively expose sources to penalties for emissions that are not within the sources' control. The commenters alleged that the EPA's proposal is unreasonable because it fails to consider the infeasibility of controlling emissions during malfunction periods. The commenters believe that because malfunction events are uncontrollable by definition, removing affirmative defense provisions applicable to malfunctions will not reduce emissions but instead will only expose facilities to potential enforcement for uncontrollable exceedances.

Response: The EPA disagrees that without affirmative defense provisions, sources will have no "relief" from liability for violations during actual malfunctions. To the extent that sources have an actual malfunction, sources retain the ability to raise this fact in the event of an enforcement action related to the malfunction. Congress has already provided courts with explicit jurisdiction and authority to determined liability and to impose appropriate remedies, based on the facts and circumstances surrounding the violation. To the extent that there are extenuating circumstances that justify not holding a source responsible for a violation or not imposing particular remedies as a result of a violation, sources retain the ability to raise these facts to the court. In addition, the absence of an affirmative defense provision in the SIP does not impede a violating source from taking appropriate actions to minimize emissions during a malfunction, so as to mitigate the potential remedies that a court may impose as a result of the violation.

Furthermore, the EPA disagrees with the commenters' premise that states have authority to create affirmative defense provisions in SIPs because some sources may otherwise be subject to enforcement actions for emissions during malfunctions. As explained in the SNPR in detail, the EPA has concluded that there is no legal basis for affirmative defenses in SIP provisions, including affirmative defenses applicable to malfunction events. Because such affirmative defense provisions purport to alter or eliminate the statutory jurisdiction of courts to determine liability and to assess appropriate remedies for violations of SIP requirements, these provisions are not permissible.

9. Comments that there will not be any reduction in overall emissions from the EPA's SIP call action because states will need to revise emission limitations to allow more emissions if affirmative defense provisions are removed from the SIPs.

Comment: Commenters on the SNPR questioned whether the elimination of affirmative defenses in SIP provisions would result in any reductions of emissions from sources. Several commenters asserted that affirmative defense provisions allow states to lower emission limitations overall. Thus, the commenters claimed that elimination of the affirmative defense provisions would obligate states to raise affected emission limitations so that sources could comply with them continuously. Another commenter criticized the EPA's approach as requiring each state to reframe the existing episodic emissions provisions of its SIP as alternative emission limitations rather than as more limited and conditional affirmative defenses. This commenter asserted that structuring the provisions as an affirmative defense allows a state to impose more stringent numerical limitations without penalizing sources for unavoidable emissions when those

[51] *See Montana Sulphur & Chemical Co.* v. *EPA,* 666 F.3d 1174 (9th Cir. 2012); *Arizona Public Service Co.* v. *EPA,* 562 F.3d 1116 (10th Cir. 2009).

they revise their SIPs in this context as in all other contexts.

As to the concern that different courts might evaluate liability for violations during SSM events differently in the absence of affirmative defense provisions, the EPA notes that this is not the relevant question. The potential for inconsistent treatment by the courts is not a basis for allowing states to retain SIP provisions that are inconsistent with the legal requirements of the CAA. In any event, the EPA disagrees that elimination of affirmative defenses in SIP provisions make it more likely that there would be "inconsistent enforcement" because of a lack of a "regulatory framework." The enforcement structure of the CAA embodied in section 113 and section 304 already provides a structure for enforcement of CAA requirements in federal courts. For example, the CAA already provides uniform criteria for courts to apply, based upon the facts and circumstances of individual enforcement actions. Similar to an affirmative defense provision, section 113(e) already enumerates the factors that courts are required to consider in determining appropriate penalties for violations and thus there is a consistent statutory framework. In essence the commenters object to the fact that in any judicial enforcement case, the court will determine liability and remedies based on the facts and circumstances of the case. However, this is an inherent feature of the enforcement structure of the CAA, regardless of whether there is an affirmative defense provision at issue.

11. Comments that the EPA should have acted in a single, comprehensive rulemaking rather than issuing the supplemental notice of proposed rulemaking.

Comment: Commenters asserted that the EPA's issuance of two separate proposals instead of one proposal has prevented states and industry from knowing the entire proposed regulatory action. The commenters claimed that if the EPA is going to issue a SIP call to states concerning the treatment of emissions during SSM events, then it should do so in a single comprehensive rulemaking. The commenters argued this is necessary because states consider different options when revising SIP provisions and that thereafter states will have to work with affected sources to revise permits.

Response: The EPA disagrees with the argument that states, industry, individuals and other interested parties have not had an opportunity to know and comment upon the Agency's entire action. The EPA's February 2013 proposal was intended to cover a broad range of issues related to the correct treatment of emissions during SSM events in SIP provisions comprehensively. Because of an intervening court decision that affected the substance of the EPA's initial proposed action, it was necessary to issue a supplemental proposal. The EPA disagrees that the issuance of the SNPR adversely affected the ability of interested parties to understand the Agency's proposed action, because the SNPR only affected one aspect of the original proposed action. As the EPA explained in the SNPR: "In this SNPR, we are supplementing and revising what we earlier proposed as a response to the Petitioner's requests but only to the extent the requests narrowly concern affirmative defense provisions in the SIPs. We are not revising or seeking further comment on any other aspects of the February 2013 proposed action." [53]

As to the commenters' concern that the EPA should take action in a single comprehensive rulemaking, the Agency is doing so. This SIP call action addresses all aspects of the Petition and it is based upon both the February 2013 proposal and the SNPR. As advocated by the commenters, the EPA's objective in this SIP call action is to provide states with comprehensive and up-to-date guidance concerning the correct treatment of emissions during SSM events in SIP provisions, consistent with CAA requirements as interpreted by recent court decisions. The EPA agrees with the commenters that providing states comprehensive guidance in this rulemaking is important to assist states in revising their SIP provisions consistent with CAA requirements. Any necessary changes to permits to reflect the removal of affirmative defense provisions from the underlying SIP will occur later, after the SIP provisions have been revised.

12. Comments that the EPA has not proven that the existence of affirmative defense provisions in SIPs is resulting in specific environmental impacts or interference with attainment and maintenance of the NAAQS.

Comment: Several commenters argued that the EPA has failed to demonstrate that the affirmative defense provisions at issue in this action have contributed to a specific NAAQS violation or otherwise caused harm to public health or the environment. The commenters contend that, because of the narrow scope of affirmative defense provisions, it is unlikely that their existence would cause or contribute to any violations of the NAAQS. Some commenters further noted that some states have experienced improved ambient air quality conditions, despite having SIPs in place with affirmative defense provisions at issue in this action.

The commenters alleged that without providing specific record-based evidence of the impacts caused by affirmative defense provisions, it is unreasonable for the EPA to determine that existing provisions are substantially inadequate or otherwise not in compliance with the CAA. Some commenters further alleged that the EPA has no authority to issue a SIP call without "find[ing] that the applicable implementation plan . . . is substantially inadequate to attain or maintain the relevant [NAAQS]."

Response: As explained in the February 2013 proposal, the SNPR and this document, the EPA does not interpret its authority under section 110(k)(5) to require proof that a deficient SIP provision caused a specific violation of the NAAQS at a particular monitor on a particular date, or that a deficient SIP provision undermined a specific enforcement action. Section 110(k)(5) explicitly authorizes the EPA to make a finding that a SIP provision is substantially inadequate to "comply with any requirement of" the CAA, in addition to the authority to do so where a SIP is inadequate to attain and maintain the NAAQS or to address interstate transport. In light of the court's decision in *NRDC* v. *EPA*, the EPA has reexamined the question of whether affirmative defenses are consistent with CAA requirements for SIP provisions. As explained in this action, the EPA has concluded that such provisions are inconsistent with the requirements of section 113 and section 304. Accordingly, the EPA has the authority to issue SIP calls to states, requiring that they revise their SIPs to eliminate the specific affirmative defense provisions identified in this action. Issues related to the EPA's authority under section 110(k)(5) are discussed in more detail in section VIII.A of this document.

13. Comments that the EPA is violating the principles of cooperative federalism through this action.

Comment: Several commenters stated that the EPA's action with respect to affirmative defenses in SIP provisions is inconsistent with the system of cooperative federalism contemplated by the CAA. The commenters alleged that this action is at odds with established CAA and judicial precedents indicating that states have broad discretion in developing SIP provisions, with the EPA's role being limited. Some commenters further alleged that the

[53] 79 FR 55919 at 55923.

month SIP development timeframe but may proceed thereafter according to normal permit revision requirements.

Finally, the EPA notes, the burdens associated with SIP revisions and permit revisions are burdens imposed by the CAA. The states have both the authority and the responsibility under the CAA to have SIPs and permit programs that meet CAA requirements. It is inherent in the structure of the CAA that states thus have the burden to revise their SIPs and permits when that is necessary, whether because of changes in the CAA, changes in judicial interpretations of the CAA, changes in the NAAQS, or a host of other potential events that necessitate such revisions. Among those is the obligation to respond to a SIP call that identifies legal deficiencies in specific provisions in a state's SIP.

15. Comments that the EPA is being inconsistent because rules promulgated by the EPA provide affirmative defense provisions for malfunction events.

Comment: A number of commenters claimed that the EPA cannot interpret the CAA to prohibit affirmative defenses in SIP provisions because the Agency itself has issued regulations that include affirmative defenses for excess emissions during malfunction events. The commenters claim that the EPA is being inconsistent on this point and thus cannot require states to remove affirmative defenses from SIPs.

Other commenters alleged that the EPA is being inconsistent because it has not adequately explained the reversal of its "decades-old" policy interpreting the CAA to allow affirmative defenses in SIP provision. The commenters cited to SIP provisions that the EPA previously approved in eight states between 2001 and 2010 that they believed would be affected by this SIP call. The commenters claimed that these prior actions were consistent with the EPA's SSM policy memoranda. Additionally, the commenters cited to federal regulations that the EPA has previously promulgated that include affirmative defense provisions. The commenters claimed that these prior actions are "inconsistent with EPA's proposed disallowance of affirmative defenses."

Response: The EPA has acknowledged that it has previously approved some SIP provisions with affirmative defenses that were consistent with its interpretation of the CAA in the 1999 SSM Guidance at the time it acted on those SIP submissions. However, since that time, two decisions from the D.C. Circuit have addressed fundamental interpretations of the CAA related to the legally permissible approaches for addressing excess emissions during SSM events.[56] In light of those decisions, as explained in detail in the February 2013 proposal, the SNPR and this document, the EPA has concluded that certain aspects of its prior interpretation of the CAA, as set forth in the SSM Policy, were not the best interpretation of the CAA. As a result, certain SIP provisions that the EPA previously approved are also not consistent with the requirements of the CAA. In particular, this includes the EPA's prior interpretation of the CAA to allow affirmative defense provisions in SIPs in the 1999 SSM Guidance.

The EPA has also acknowledged that it has in the past taken a similar approach regarding affirmative defense provisions in federal regulations addressing hazardous air pollution and in new source performance standards. Indeed, the EPA's inclusion of an affirmative defense provision in a federal regulation resulted in the court decision in *NRDC* v. *EPA*, in which the court rejected the Agency's interpretation of the CAA to allow affirmative defenses that limit or eliminate the jurisdiction of the courts. Just as the EPA is calling on states to revise their SIPs to remove affirmative defense provisions, the Agency is also taking action to correct such provisions in federal regulations.[57] The continued existence of such provisions in the EPA regulations that have not yet been corrected does not mean that such provisions are authorized either in state or federal regulations.

As to the claim that the EPA has not adequately explained the basis for changing its interpretation of the CAA regarding affirmative defenses in SIP provisions, the Agency disagrees. The SNPR set forth in detail the basis for the EPA's revised interpretation of the CAA, in light of the court's decision in *NRDC* v. *EPA*.[58] The commenters failed to specify why this explanation was "inadequate."

16. Comments that existing affirmative defense provisions do not preclude parties from filing enforcement actions or hinder parties from seeking injunctive relief for violations of SIP requirements.

Comment: One state commenter asserted that the existing affirmative defense provisions in the state's SIP do not prevent the state or the EPA from pursuing injunctive relief or mitigation of environmental impacts in the event of violations. Thus, the commenter supported the EPA's prior interpretation of the CAA to allow affirmative defense provisions, so long as courts can still award injunctive relief for violations. The commenter did not articulate how this prior statutory interpretation is consistent with the reasoning of the court in *NRDC* v. *EPA* concerning the same statutory provisions.

By contrast, an environmental group commenter cited a citizen suit enforcement case in Texas in which the commenter claimed that the affirmative defense provision in that state's SIP operated as a *de facto* shield against any enforcement. The commenter stated that the EPA's approval of the affirmative defense was premised upon its only applying to civil penalties and not to injunctive relief and that the Agency's approval of the SIP provision was explicitly upheld on this basis by the Fifth Circuit. Nevertheless, the commenter asserted, the state agency has implemented this provision such that if the affirmative defense criteria are met, there is "no violation" and thus no potential for injunctive relief.

Response: The EPA agrees that some of the affirmative defense provisions at issue in this action are expressly limited to monetary penalties and not to injunctive relief. This approach was consistent with the EPA's prior interpretation of the CAA concerning affirmative defense provisions in SIPs but also consistent with the arguments that the D.C. Circuit rejected in the *NRDC* v. *EPA* decision. Thus, the fact that some of the affirmative defense provisions addressed in this action preserve the possibility for injunctive relief, even if the court could award no monetary penalties, is no longer a deciding factor.

The EPA also agrees that some agencies or courts may not apply the affirmative defense provisions in the manner intended at the time the EPA approved them into the SIP. Incorrect application of SIP affirmative defense provisions by sources, regulators or courts is a matter of concern. However, even perfect implementation of a SIP affirmative defense provision does not cure the underlying and now evident absence of a legal basis for such provisions. Again, the fact that a given affirmative defense provision is being implemented correctly or incorrectly is no longer a deciding factor for purposes of this SIP call action.

These issues are not pertinent to the EPA's decision in this action to require states to remove the affirmative defense provisions from the previously approved SIPs. Rather, as explained in

[56] *See Sierra Club* v. *Johnson*, 551 F.3d 1019 (D.C. Cir. 2008), in the rulemaking docket at EPA–HQ–OAR–2012–0322–0048; *see also NRDC* v. *EPA*, 749 F.3d 1055 (D.C. Cir. 2014), in the rulemaking docket at EPA–HQ–OAR–2012–0322–0885.

[57] *See, e.g.*, 79 FR 60897 (October 8, 2014); 79 FR 72914 (December 8, 2014).

[58] 79 FR 55919 at 55929–30.

continuous controls and cannot include exemptions for emissions during SSM events. The EPA concludes that making the exemptions from emission limitations conditional does not alter the fact that once exercised they are illegal exemptions.

19. Comments that the definition of "emission limitation" in CAA section 302(k) does not support this SIP call action.

Comment: Several commenters noted that while the EPA depends on the definition of "emission limitation" in the CAA section 302(k) for this action, that CAA provision does not support this SIP call action, including that the CAA does not require that SIPs contain continuous emissions standards in the form asserted by the EPA. The commenters alleged that the definition in the CAA and supporting materials interpreting that definition do not support the EPA's requiring one emission limitation to apply in all circumstances at all times. Some commenters further alleged that states subject to the EPA's SIP call action have implementation plans that provide emission limitations that apply continuously through a combination of numerical emission limitations, the general duty to minimize emissions and the affirmative defense criteria for excess emissions during malfunctions.

Several commenters questioned why, even if the challenged affirmative defense provisions do not qualify as "emission limitations" or "emissions standards" under the first part of the definition, they are not approvable as "design, equipment, work practice or operational standards" promulgated under the second part of the definition. Some commenters argued that, to the extent that affirmative defense provisions in SIPs do not satisfy the definition of "emission limitation," they would still be approvable elements of a SIP as "other control measures, means, or techniques" allowed under CAA section 110(a)(2). Further, some commenters believe that the legislative history cited in the SNPR does not support the EPA's position but rather is only intended to preclude the use of dispersion techniques, such as intermittent controls.

One commenter stated that the Portland Cement NESHAP, at issue in the *NRDC* v. *EPA* decision, was classified by statute as an "emissions standard," a term defined by the CAA and defined as applying "on a continuous basis." The commenter stated that SIP provisions involve more than "emissions standards" and need not be "emissions standards." [60] Thus, according to the commenter, the *NRDC* v. *EPA* decision does not apply to SIP rules.

Response: The commenters alleged that the EPA's interpretation of the CAA section 302(k) definition of "emission limitation" in this action was inappropriate and that section 302(k) does not support this SIP call action. The EPA notes that it is not the Agency's position that all emission limitations in SIP provisions must be set at the same numerical level for all modes of source operation or even that they must be expressed numerically at all. To the contrary, the EPA intended in the February 2013 proposal and the SNPR to indicate that states may elect to create emission limitations that include alternative emission limitations, including specific technological controls or work practices, that apply during certain modes of source operation such as startup and shutdown. However, this comment is not relevant to the issue of affirmative defense provisions in SIPs. It is not for the reason that affirmative defense provisions do not meet the definition of an "emission limitation" in section 302(k) that the EPA is promulgating this SIP call action for affirmative defense provisions. The EPA has concluded that affirmative defense provisions are substantially inadequate to meet CAA requirements concerning enforcement, in particular the requirements of section 113 and section 304.

As to commenters' argument that affirmative defense provisions can be appropriately considered to be "design, equipment, work practice or operational standards" under CAA section 302(k), the critical aspect of an emission limitation in general is that it be a "requirement . . . which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis . . . ." These provisions operate to *excuse* sources from liability for emissions under certain conditions, not to *limit* the emissions in question. The affirmative defense provisions at issue in this final action do not themselves, or in combination with other components of the emission limitation, limit the quantity, rate or concentration of air pollutants on a continuous basis. These affirmative defense provisions, therefore, do not themselves meet the statutory definition of an emission limitation under section 302(k).

The EPA notes that the definition of "emission limitation" in section 302(k) is relevant, however, with respect to those affirmative defense provisions that commenters claim are merely a means to define what constitutes a "violation" of an applicable SIP emission limitation. As previously explained, the EPA believes that an "affirmative defense" structured in such a fashion is deficient because it in effect creates a conditional exemption from the SIP emission limitations. By creating such exemptions, conditional or otherwise, an affirmative defense of this type would render the emission limitations less than continuous.

The EPA disagrees with commenters' remaining points because the EPA's position on what appropriately qualifies as an emission limitation is consistent with the CAA, relevant legislative history and case law. These issues are addressed in more detail in sections VII.A.3.i through 3.j of this document.

20. Comments that the EPA has failed to show that state SIPs are substantially inadequate, as is required to promulgate a SIP call.

Comment: Several commenters noted that before the EPA can issue a SIP call under section 110(k)(5) with respect to affirmative defense provisions, the EPA must determine that a SIP provision is "substantially inadequate to attain or maintain the relevant [NAAQS], to mitigate adequately the interstate pollutant transport described in section 7506a of this title or section 7511c of this title, or to otherwise comply with any requirement of this chapter." The commenters further stated that Congress employed a high bar in the language of CAA section 110(k)(5) in requiring the EPA to find "substantial" inadequacies, as opposed to other CAA provisions that permit the Agency to act based on "discretion" or when it "may be appropriate." The commenters alleged that the EPA has not demonstrated a "substantial inadequacy" with respect to the affirmative defense provisions at issue in the SNPR, as required to issue a SIP call.

Some commenters also argued that the EPA has failed in its SNPR to define or interpret "substantially inadequate" or provide any standards for assessing the adequacy of a SIP with respect to affirmative defense provisions. The commenters also alleged that, if the EPA is required to rely on data and evidence in evaluating SIP revisions, it follows that the EPA should produce at least the same level of data and evidence, if not more, to support a SIP call that is based on the more stringent substantial inadequacy standard of section 110(k)(5).

Response: The EPA disagrees with the commenters' arguments that the Agency has failed to establish that the

[60] *See* CAA section 110(a)(2)(A).

22. Comments that the EPA should clarify that SIPs can include work practice standards or general-duty clauses to apply during malfunction periods in place of affirmative defense provisions.

Comment: Several commenters stated that the EPA should announce in this final action that in lieu of affirmative defenses, states may elect to revise their SIP provisions to include work practice standards or general-duty clauses that are modeled on existing affirmative defense provisions and that would apply during malfunctions. Most of these commenters advocated that the EPA's previously recommended criteria for an "affirmative defense" for malfunctions should simply be changed into criteria for a "work practice" provision instead. One commenter made the same suggestion but also advocated that the EPA eliminate six of the nine criteria and rephrase the remaining criteria, in order to "improve the standards, reduce uncertainty, and reduce wasteful litigation." This commenter advocated that the EPA also redefine the term "malfunction" to much more broadly mean any "sudden and unavoidable breakdown of process or control equipment." Specifically, the commenter advocated, the EPA should no longer recommend that a malfunction be defined as an event that: (i) Was caused by a sudden, infrequent and unavoidable failure of air pollution control equipment, process equipment or a process to operate in a normal or usual manner; (ii) could not have been prevented through careful planning, proper design or better operation and maintenance practices; (iii) did not stem from any activity or event that could have been foreseen and avoided or planned for; and (iv) was not part of a recurring pattern indicative of inadequate design, operation or maintenance. By changing the "affirmative defense" provisions for malfunctions into "work practice" or "general duty" provisions for malfunctions, the commenters argued, the revised provisions would be consistent with CAA requirements. Under this approach, the commenters asserted that compliance with these new requirements would mean that any emissions during a malfunction event could not be considered "excess" or result in any violation if the source had complied with the "work practice" criteria.

Response: As an initial matter, the EPA has not established a regulatory definition of "malfunction" that is binding on states when developing SIPs. States have the flexibility in their SIPs to define that term. Thus, the EPA is not addressing here the comments requesting that EPA "redefine" the definition of malfunction.

Regarding the more general concern of the commenters, that states be allowed to establish an alternative emission limitation in the form of a work practice standard that applies during malfunctions, the EPA notes two points. First, the CAA does not preclude that emissions during malfunctions could be addressed by an alternative emission limitation. The EPA's general position in the context of standards under sections 111, 112 and 129 is that: (i) The applicable emission limitation applies at all times including during malfunctions; (ii) the CAA does not require the EPA to take into account emissions that occur during periods of malfunction when setting such standards; and (iii) accounting for malfunctions would be difficult, if not impossible, given the myriad types of malfunctions that can occur across all sources in a source category and given the difficulties associated with predicting or accounting for the frequency, degree and duration of various malfunctions that might occur. Although the EPA has not, to date, found it practicable to develop emission standards that apply during periods of malfunction in place of an otherwise applicable emission limitation, this does not preclude the possibility that a state may determine that it can do so for all or some set of malfunctions. Second, states are not bound to establish any specific definition of "malfunction" in their SIPs. Thus, it is difficult to judge at this time whether any particular alternative emission limitation in a SIP for malfunctions, including any specific work practice requirements in place of an otherwise applicable emission limitation, would be approvable.

With regard to the specific comment that the affirmative defense criteria could be converted into a work practice requirement to apply during malfunctions in place of an otherwise applicable emission limitation, the EPA is unsure at this time whether the criteria previously recommended for an affirmative defense provision would serve to meet the obligation to develop an appropriate alternative emission limitation. Existing affirmative defense criteria (which include, among other things, making repairs expeditiously, taking all possible steps to minimize emissions and operating in a manner consistent with good practices for minimizing emissions) were developed in the context of helping to determine whether a source should be excused from monetary penalties for violations of CAA requirements and were not developed in the context of establishing an enforceable alternative emission limitation under the Act. The EPA would need to consider this approach in the context of a specific SIP regulation for a specific type of source and emission control system.

Finally, the EPA notes that any emission limitation, including an alternative emission limitation, that applies during a malfunction must meet the applicable stringency requirements for that type of SIP provision (*e.g.*, would need to meet RACT for sources subject to the RACT requirement) and must be legally and practically enforceable. Thus, the SIP provision would need to: (i) Clearly define when the alternative emission limitation applied and the otherwise applicable emission limitation did not; (ii) clearly spell out the requirements of that standard; and (iii) include adequate monitoring, recordkeeping and reporting requirements in order to make it enforceable. In addition, the state would need to account for emissions attributable to these foreseen events in emissions inventories, modeling demonstrations and other regulatory contexts as appropriate.

23. Comments that the EPA has failed to account adequately for the cost of this SIP call action and is therefore in violation of the Regulatory Flexibility Act, the Unfunded Mandates Reform Act and Administration policy.

Comment: Two commenters argued that the SNPR lacks sufficient analysis of what this action will cost states, stationary sources and the public. The commenters allege that this absence of economic impact analysis is contrary to the Regulatory Flexibility Act, the Unfunded Mandates Reform Act and Administration policy. One of the commenters also noted that imposing substantial "unfunded mandates" on state regulatory agencies and forcing stationary sources to absorb additional costs should be evaluated carefully.

Response: The EPA disagrees with the commenters' allegation that the EPA has failed to comply with relevant statutes and Administration policy in accounting for the cost of the actions proposed in the SNPR. The EPA did in fact properly consider the costs imposed by this action. These issues are addressed in more detail in section V.D.7 of this document.

24. Comments that states should not be required to eliminate affirmative defense provisions but rather should be allowed to revise them to be appropriate under CAA requirements.

Comment: One state commenter claimed that it should be allowed to revise its existing affirmative defense

permit terms and without requiring a BACT/LAER/ambient impacts analysis and has done so without public notice and comment. Commenters urged the EPA to require states to follow public notice-and-comment processes before issuing any permits for sources with alternative limitations less stringent than those imposed by the SIP and claimed such process is required under the CAA.

In addition, some commenters stated that if the EPA allows states to set "new, higher, or alternate limits" applicable during startup and shutdown, the EPA should set clear parameters. According to commenters, the EPA at a minimum should require, for emissions that have not previously been authorized or considered part of a source's potential to emit, that: (i) Limitations must meet BACT/LAER; (ii) there should be clear, enforceable rules for when alternate limitations apply; (iii) there should be a demonstration that worst-case emissions will not cause or contribute to a violation of the NAAQS or PSD increments; and (iv) proposed limitations should be subject to public notice and comment and judicial review. The commenter pointed to a letter from the EPA to Texas in which, the commenter claims, the Agency indicated that these parameters must be met.

A commenter stated that the EPA should unequivocally state in this final action that: (i) All potential to emit emissions, including quantifiable emissions associated with startup and shutdown, must be included in federal applicability determinations and air quality permit reviews; (ii) authorization of these emissions must include technology reviews and impacts analyses; and (iii) the above requirements must be included in the permit that authorizes routine emissions from the applicable units and must be subject to public notice, comment and judicial review.

A commenter recognized that there may be a variety of ways in which states can authorize different limits to apply during startup and shutdown but argued that, no matter the method chosen, the emissions need to be fully accounted for by the state in the relevant SIP, including a demonstration that the additional emissions authorized during startup and shutdown will not violate any NAAQS.

Response: The EPA understands the concerns raised by the commenters but does not agree that further regulatory action such as issuance of regulatory text is necessary at this time. Through this action, the EPA is providing comprehensive guidance to states concerning issues related to the proper treatment of emissions during SSM events in SIP provisions. For example, the EPA is addressing the concern raised by commenters that states will need to ensure that any SIP revisions in response to this SIP call will meet applicable CAA requirements. Under section 110(k)(3), the EPA has authority to approve SIP revisions only if they comply with CAA requirements. Moreover, under section 110(l), the EPA cannot approve SIP revisions if they would "interfere with any applicable requirement concerning attainment and reasonable further progress . . . or any other applicable requirement" of the CAA. The EPA believes that both states and the Agency can address these issues in SIP rulemakings without the need for any additional federal regulations as suggested by the commenters.

The EPA agrees with the concerns raised by the commenters regarding instances where a state has issued source permits that impose less stringent emission limitations than otherwise established in the SIP. Using a permitting process to create exemptions from emission limitations in SIP emission limitations applicable to the source is tantamount to revising the SIP without meeting the procedural and substantive requirements for a SIP revision. The Agency's views on this issue are described in more detail in section VII.C.3.e of this document.

The EPA does not agree with the comment that suggests "worst-case modeling" would always be needed to show that a SIP revision establishing alternative emission limitations for startup and shutdown would not interfere with attainment or reasonable further progress. The nature of the technical demonstration needed under section 110(l) to support approval of a SIP revision depends on the facts and circumstances of the SIP revision at issue. The EPA will evaluate SIP submissions that create alternative emission limitations applicable to certain modes of operation such as startup and shutdown carefully and will work with the states to assure that any such limitations are consistent with applicable CAA requirements. Under certain circumstances, there may be alternative emission limitations that necessitate a modeling of worst-case scenarios, but those will be determined on a case-by-case basis.

The EPA also does not agree that existing SIP provisions with alternative emission limitations should automatically "sunset" upon promulgation of a new or revised NAAQS. Such a process could result in gaps in the state's regulatory structure that could lead to backsliding. When the EPA promulgates new or revised NAAQS, it has historically issued rules or guidance to states concerning how to address the transition to the new NAAQS. In this process, the EPA typically addresses how states should reexamine existing SIP emission limitations to determine whether they should be revised. With respect to technology-based rules, the EPA has typically taken the position that states need not adopt new SIP emission limitations for sources where the state can demonstrate that existing SIP provisions still meet the relevant statutory obligations. For example, the EPA believes that states can establish that existing SIP provisions still represent RACT for a specific source or source category for a revised NAAQS. In making this determination, states would need to review the entire emission limitation, including any alternative numerical limitations, control technologies or work practices that apply during modes of operation such as startup and shutdown, and ensure that all components of the SIP emission limitation meet all applicable CAA requirements.

27. Comments that the EPA should closely monitor states' SIP revisions in response to this SIP call.

Comment: Commenters urged the EPA to monitor states' efforts to revise SIPs in response to the SIP call closely in order to assure that the revisions meet all applicable requirements. The commenters indicated concern that states and industry may weaken emission limitations through this process. The commenter alleged that one state has issued permits for sources with emission limitations applicable during SSM events that are less stringent than the emission limitations approved in the SIP. Furthermore, the commenter alleged, the state issued these permits without public notice and comment. As support for this contention, the commenter detailed the differences between the requirements of a permit issued for a source and the requirements in the SIP. The commenter also claimed that the state has issued permits for other facilities similar to the one it described in detail in the comments.

Response: The EPA understands the concerns expressed by the commenter that SIP revisions made in response to this SIP call need to be consistent with CAA requirements. As explained in this document, the states and the EPA will work to assure that the SIP revisions will meet applicable legal requirements. The EPA will evaluate these SIP submissions consistent with its

due process arguments, the EPA believes that Congress has already adequately addressed their concerns about potential unfair punishment for violations by authorizing courts to consider a range of factors in determining what remedies to impose for a particular violation, including the explicit factors for consideration in imposition of civil penalties as well as other factors as justice may require.

The EPA acknowledges that is has previously relied on affirmative defense provisions as a mechanism to mitigate penalties where a violation was beyond the control of the owner or operator. These actions, however, predated the court's decision in *NRDC* v. *EPA* and the EPA has since revised its approach to affirmative defense provisions in its own rulemaking actions. In addition, the EPA believes that the penalty criteria in section 113(e) provide a similar function and the commenters do not explain why they believe these explicit statutory factors do not provide sufficient relief from the imposition of an allegedly unconstitutionally excessive penalty.

31. Comments that the EPA should impose a deadline of 12 months for states to respond to this SIP call with respect to affirmative defense provisions.

Comment: An environmental organization commented that the EPA should require affected states to make the required SIP revisions within 12 months, rather than the 18 months proposed in the February 2013 proposal and the SNPR. The commenter claimed that communities near large sources have been suffering for decades and individuals are suffering adverse health effects because of the emissions from sources that are currently allowed by deficient SIP provisions. The commenter also stated that the EPA has recognized that excess emissions allowed by the SIP provisions subject to the SIP call are continuing to interfere with attainment and maintenance of the NAAQS and that this justifies imposing a shorter schedule for states to respond to the SIP call.

Response: The EPA acknowledges the concerns expressed by the commenters and the importance of providing environmental protection. However, as explained in the February 2013 proposal and in section IV.D.14 of this document, the EPA believes that providing states with the full 18 months authorized by section 110(k)(5) is appropriate in this action. The EPA is taking into consideration that state rule development and the associated administrative processes can be complex and time-consuming. This is particularly true where states might elect to consider more substantial revision of a SIP emission limitation, rather than merely removal of the impermissible automatic or discretionary exemption or the impermissible affirmative defense provision. In addition, the EPA believes that providing states with the full 18 months will be more likely to result in timely SIP submissions that will meet CAA requirements and provide the ultimate outcome that the commenters seek. Some states subject to the SIP call may be able to revise their deficient SIP provisions more quickly, and the EPA is committed to working with states to revise these provisions consistent with CAA requirements in a timely fashion. For these reasons, the EPA does not agree that it would be reasonable to provide less than the 18-month maximum period allowed under the CAA for states to submit SIP revisions in response to the SIP call.

32. Comments that the EPA should encourage states to add reporting and notification provisions into their SIPs.

Comment: A commenter urged the EPA to encourage states to make information about excess emissions events easily and quickly accessible to the public. The commenter claimed that it is unacceptable to make it difficult for members of the public to obtain information about potential harmful exposure to pollutants and that state "open-record" request laws are inadequate, particularly when the public is not informed that an event occurred. The commenter also asserted that reporting provisions enhance compliance and cited to the Toxic Release Inventory program's success in driving pollution reduction. The commenter argued that contemporaneous reporting of the conditions surrounding a violation, the cause and the measures taken to limit or prevent emissions ensure that stakeholders can respond in real time and also target enforcement efforts to violations where further action is warranted. As support for this approach, the commenter pointed to Jefferson County, Kentucky, as a local air quality control area that has already corrected problematic regulations in advance of this SIP call and also noted that the County included notification and reporting requirements, recognizing that they would reduce the burden on the government in trying to calculate the level of excess emissions and also help in responding to citizen inquiries about such events.

Response: The EPA agrees with the commenter that reporting and notification provisions can ease the burden on government agencies by placing the burden on the entity that is in the best position to calculate the level of excess emissions and also provide other relevant information regarding such events. In addition, to make this information available to the public quickly allows for a timely response if there is any health concern. An increased level of communication between industry and residents also serves to build a better community relationship and partnership. The EPA also supports such requirements as components of SIP emission limitations because they facilitate effective compliance assurance. However, the EPA does not believe that the Agency should create a separate federal requirement addressing this issue beyond general CAA requirements at this time.

33. Comments that this SIP call action concerning affirmative defense provisions is being taken pursuant to sue-and-settle tactics.

Comment: One commenter alleged that the action proposed in the EPA's SNPR has an "impermissible sue-and-settle genesis" and that the EPA is attempting to grant as much of Sierra Club's petition as it can "regardless of the wisdom or permissibility of doing so."

Response: The EPA disagrees with the commenter's allegation that the EPA's proposed action in the SNPR is inappropriate because it is the result of "sue-and-settle" actions. This is a rulemaking in which the EPA is taking action to respond to a petition for rulemaking, and it has undergone a full notice-and-comment rulemaking process as provided for in the CAA. This issue is addressed in more detail in section V.D.1 of this document.

34. Comments that affirmative defense provisions do not alter or eliminate federal court jurisdiction and therefore do not violate CAA sections 113 or 304.

Comment: Two commenters argued that SIP affirmative defense provisions do not in fact interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of CAA section 304, because plaintiffs have the right to bring a citizen suit despite the existence of affirmative defense provisions. One commenter cited at least four instances in the last few years in which environmental groups filed enforcement actions against sources in federal district court based on alleged emissions events for which the companies asserted affirmative defenses. The commenters stated that courts applied the affirmative defense provision criteria and the criteria of section 113(e) to determine

discuss the *Luminant Generation* v. *EPA* decision in the SNPR and also explained in detail why it believes that the logic of the DC Circuit's decision in *NRDC* v. *EPA* supports this SIP call action for affirmative defense provisions. Specifically, the EPA recognized that both the Fifth Circuit and the DC Circuit were evaluating the same fundamental question—whether section 113 and section 304 preclude the creation of affirmative defense provisions that alter or eliminate the jurisdiction of federal courts to determine liability and impose remedies for violations of CAA requirements in judicial enforcement actions. The EPA explained that, after reviewing the *NRDC* v. *EPA* decision and the *Luminant Generation* v. *EPA* decision, the Agency determined that its prior interpretation of the CAA, as advanced in both courts, is not the best reading of the statute. Indeed, it is significant that the *Luminant* court upheld the EPA's approval of affirmative defense provisions for unplanned events (*i.e.*, malfunctions) and the disapproval of affirmative defenses for planned events (*i.e.*, startup, shutdown and maintenance) specifically because the court deferred to the Agency's reasonable interpretation of ambiguous statutory provisions in the case at hand. In the SNPR, the EPA explained point by point why it now believes that the decision of the DC Circuit in *NRDC* v. *EPA* reflected the better reading of section 113 and section 304 and thus that the Agency no longer interprets the CAA to permit affirmative defenses in SIP provisions. Therefore, the EPA believes the Fifth Circuit could also take a different view of the reasonableness of the EPA's resolution of ambiguous provisions after reviewing the EPA's current interpretation of the statute.

37. Comments that the EPA has recently approved affirmative defense provisions through various SIP actions and, therefore, these provisions are proper under the EPA's interpretation of the CAA.

Comment: One commenter noted that the EPA has never taken issue with the affirmative defense provisions in states' SIPs across the many instances where the EPA has reviewed the states' later SIP submissions. The implication of the commenters' argument is that if the EPA has previously approved a SIP submission and directly or indirectly reapproved an affirmative defense provision in the past, this means that the affirmative defense provision still meets CAA requirements.

Response: The EPA disagrees with this comment. As explained in the EPA's response in section VIII.D.18 of this document, when the EPA takes final action on a state's SIP submission, this does not necessarily entail reexamination and reapproval of every provision in the existing SIP. The EPA often only examines the specific SIP provision the state seeks to revise in the SIP submission, which may not include any affirmative defense provisions. To the extent the EPA did review and approve any affirmative defense provision consistent with its prior interpretation of the CAA that narrowly tailored affirmative defenses were appropriate, the EPA has fully explained why it is now revising that interpretation such that past action based on the earlier interpretation would no longer provide precedent for the EPA's actions. As part of this final action, applying its revised SSM Policy, the EPA is taking action to address affirmative defense provisions in SIPs. Since the issuance of the court's opinion in *NRDC* v. *EPA*, the EPA has similarly taken steps in its own ongoing NSPS and NESHAP rulemakings to ensure that any existing affirmative defense provisions are removed and that no affirmative defenses are proposed or finalized.[64]

38. Comments that affirmative defense provisions function as structured state "enforcement discretion" and are an important tool for states to prioritize enforcement activities.

Comment: A state commenter characterized the affirmative defense contained in the state's SIP as an "enforcement discretion" tool that supports the state's regulation of excess emissions during malfunction events and promotes preventive measures, proper monitoring and reporting by sources. The state asserted that removal of the affirmative defense provision from the SIP would require the state to address and track violations that are not a high priority to the state agency. The state argued that the affirmative defense provision provides certainty to the regulated community by providing structure to how the state will exercise its enforcement discretion. The state expressed concern that without the affirmative defense, there will be uncertainty for the regulated community and less incentive for sources to make repairs and submit excess emissions reports promptly. The commenter explained that state law requires reporting of emission events that exceed an established "reportable" quantity and that this prompt reporting allows the state agency to evaluate each event reported quickly. In investigating reports of emission events, the state claimed, it "exercises enforcement discretion only in cases in which it determines that each affirmative defense criteria is met," and the state claimed that elimination of the affirmative defense provision would result in an increase of unavoidable emissions being treated as violations. In general, the state objected to the elimination of the affirmative defense provision because it would strain the state agency's enforcement resources.

Response: These comments concerning the state's use of affirmative defense criteria in structuring the exercise of its enforcement discretion (*e.g.*, determining whether to bring an enforcement action or to further investigate an emissions events) appear to be based on a misunderstanding of the SNPR. This SIP call action directing states to remove affirmative defense provisions from SIPs would not prevent the state from applying such criteria in the exercise of its own enforcement discretion. For example, the state is free to consider factors such as a facility's efforts to comply and the facility's compliance history in determining whether to investigate an excess emissions event or whether to issue a notice of violation or otherwise pursue enforcement. Application of such criteria may well be useful and appropriate to the state in determining the best way to allocate its own enforcement resources. So long as a state does not use the criteria in such a way that the state fails to have a valid enforcement program as required by section 110(a)(2)(C), the state is free to use criteria like those of an affirmative defense as a way to "structure" its exercise of its own enforcement discretion.

However, as explained in the SNPR, the EPA's view is that SIPs cannot include affirmative defense provisions that alter the jurisdiction of the federal court to assess penalties in judicial enforcement proceeding for violation of CAA requirements. The EPA has determined that the specific affirmative

[64] *See, e.g.*, "National Emission Standards for Hazardous Air Pollutants Residual Risk and Technology Review for Flexible Polyurethane Foam Production; Final rule," 79 FR 48073 (August 15, 2014) (announcing decision not to finalize the proposed affirmative defense); "National Emission Standards for Hazardous Air Pollutants: Generic Maximum Achievable Control Technology Standards; and Manufacture of Amino/Phenolic Resins; Final rule," 79 FR 60897 (October 8, 2014) (announcing decision not to finalize the proposed affirmative defense); "Oil and Natural Gas Sector: Reconsideration of Additional Provisions of New Source Performance Standards; Final rule," 79 FR 79017 (December 31, 2014) (removing affirmative defense from regulations); and "National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters; Proposed rule," 80 FR 3089 (January 21, 2015) (proposing to remove affirmative defense from regulations).

normal rulemaking and SIP revision processes to correct any identified problems.

Response: The CAA provides a mechanism specifically for the correction of flawed SIPs. Section 110(k)(5) provides: "Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to . . . comply with any requirement of [the Act], the Administrator shall require the State to revise the plan as necessary to correct such inadequacies." This type of action is commonly referred to as a "SIP call." The EPA, in this action, is using a SIP call to notify states of flawed provisions in SIPs and initiate a process for correction of those provisions.

The EPA, largely through its Regional Offices, has individually reviewed each state provision subject to the SIP call. The EPA will work closely with each state, during future rulemaking actions taken by states to adopt SIP revisions and then subsequent actions by the EPA, to determine whether these adopted SIP revisions meet the mandate of the SIP call and are consistent with CAA requirements. As part of these actions, each individual state will work closely with the EPA to address the SIP deficiencies identified in this action.

42. Comments that the EPA should not consider those comments on the February 2013 proposal that concern affirmative defense provisions in SIPs to no longer be relevant.

Comment: One commenter disagreed with the EPA's decision not to respond to certain comments submitted on the February 2013 proposal, to the extent the comments applied to issues related to affirmative defense provisions in SIPs generally or to issues related to specific affirmative defense provisions identified by the Petitioner, on a basis that those comments are no longer relevant if the EPA finalizes its action as proposed in the SNPR. According to the commenter, the EPA's interpretation of the CAA has not changed so as to exclude the other SSM provisions in the proposed action, and this alone shows that the comments submitted on the February 2013 proposal are still relevant.

Response: The EPA's proposed action on the Petition in the SNPR superseded the February 2013 proposal with respect to the issues related to affirmative defense provisions in SIPs. As explained in detail in the SNPR, after the February 2013 proposal, a federal court ruled that the CAA precludes authority of the EPA to create affirmative defense provisions applicable to private civil suits in its own regulations. As a result, the EPA issued the SNPR to propose applying a revised interpretation of the CAA to affirmative defense provisions in SIPs consistent with the reasoning of court's decision in *NRDC* v. *EPA*. The EPA supplemented and revised its proposed response to the issues raised in the Petition to the extent they concern affirmative defenses in SIPs, and the EPA solicited comment on its revised proposed response. Because the EPA's interpretation of the CAA with respect to the legal basis for affirmative defense provisions in SIPs changed from the time of the February 2013 proposal to the SNPR, comments on the February 2013 proposal, to the extent they concern affirmative defenses in SIPs, are not relevant to the EPA's revised proposed action. For example, comments on the February 2013 proposal that argue that the EPA was wrong to interpret the CAA to allow affirmative defense provisions for malfunction events but not for startup or shutdown events are not relevant when the Agency's interpretation of the CAA is now that no such affirmative defense provisions are valid. Similarly, comments that the criteria that the EPA previously recommended for valid affirmative defense provisions were too many, too few, too stringent or too lax simply have no relevance when the EPA does not interpret the CAA to allow any such affirmative defense provisions regardless of the number, nature or stringency of the criteria for qualifying for the affirmative defense. The EPA believes that it is reasonable for the Agency to determine that comments that have no bearing on the proposed action concerning affirmative defense provisions in the SNPR are not relevant. Because the EPA is finalizing the action on the Petition as proposed in the SNPR concerning affirmative defense provisions in SIPs, it is doing so based on evaluation of the comments that are relevant to the SNPR.

V. Generally Applicable Aspects of the Final Action in Response to Request for the EPA's Review of Specific Existing SIP Provisions for Consistency With CAA Requirements

A. What the Petitioner Requested

The Petitioner's second request was for the EPA to find as a general matter that SIPs "containing an SSM exemption or a provision that could be interpreted to affect EPA or citizen enforcement are substantially inadequate to comply with the requirements of the Clean Air Act." [65] In addition, the Petitioner requested that if the EPA finds such defects in existing SIPs, the EPA "issue a call for each of the states with such a SIP to revise it in conformity with the requirements or otherwise remedy these defective SIPs." [66]

The Petitioner argued that many SIPs currently contain provisions that are inconsistent with the requirements of the CAA. According to the Petitioner, these provisions fall into two general categories: (1) Exemptions for excess emissions by which such emissions are not treated as violations; and (2) enforcement discretion provisions that may be worded in such a way that a decision by the state not to enforce against a violation could be construed by a federal court to bar enforcement by the EPA under CAA section 113, or by citizens under CAA section 304.

First, the Petitioner expressed concern that many SIPs have either automatic or discretionary exemptions for excess emissions that occur during periods of SSM. Automatic exemptions are those that, on the face of the SIP provision, provide that any excess emissions during such events are not violations even though the source exceeds the otherwise applicable emission limitations. These provisions preclude enforcement by the state, the EPA or citizens, because by definition these excess emissions are defined as not violations. Discretionary exemptions or, more correctly, exemptions that may arise as a result of the exercise of "director's discretion" by state officials, are exemptions from an otherwise applicable emission limitation that a state may grant on a case-by-case basis with or without any public process or approval by the EPA, but that do have the effect of barring enforcement by the EPA or citizens. The Petitioner argued that "[e]xemptions that may be granted by the state do not comply with the enforcement scheme of title I of the Act because they undermine enforcement by the EPA under section 113 of the Act or by citizens under section 304."

The Petitioner explained that all such exemptions are fundamentally at odds with the requirements of the CAA and with the EPA's longstanding interpretation of the CAA with respect to excess emissions in SIPs. SIPs are required to include emission limitations designed to provide for the attainment and maintenance of the NAAQS and for protection of PSD increments. The Petitioner emphasized that the CAA requires that such emission limitations be "continuous" and that they be established at levels that achieve sufficient emissions control to meet the required CAA objectives when adhered

[65] Petition at 14.

[66] *Id.*

without meeting the statutory requirements of the CAA for SIP revisions. In particular, the EPA interprets the CAA to preclude SIP provisions that provide director's discretion authority to create discretionary exemptions for violations when the CAA would not allow such exemptions in the first instance. As with automatic exemptions for excess emissions during SSM events, discretionary exemptions for such emissions interfere with the primary air quality objectives of the CAA, undermine the enforcement structure of the CAA and eliminate the incentive for emission sources to minimize emissions of air pollutants at all times, not solely during normal operations. Through this action, the EPA is reiterating its interpretation of the provisions of the CAA that preclude unbounded director's discretion provisions in SIPs. The EPA is also explaining two ways in which air agencies may elect to correct a director's discretion type of deficiency. The issue of director's discretion in SIP provisions applicable to SSM events is discussed in more detail in section VII.C of this document.

With respect to enforcement discretion provisions in SIPs, the EPA also has a longstanding interpretation of the CAA that SIPs may contain such provisions concerning the exercise of discretion by the air agency's own personnel, but such provisions cannot bar enforcement by the EPA or by other parties through a citizen suit.[69] In the event such a SIP provision could be construed by a court to preclude EPA or citizen enforcement, that provision would be at odds with fundamental requirements of the CAA pertaining to enforcement. Such provisions in SIPs can interfere with effective enforcement by the EPA and the public to assure that sources comply with CAA requirements, and this interference is contrary to the fundamental enforcement structure provided in CAA sections 113 and 304. The issue of enforcement discretion in SIP provisions applicable to SSM events is discussed in more detail in section VII.D of this document.

The EPA has evaluated the concerns expressed by the Petitioner with respect to each of the identified SIP provisions and has considered the specific remedy sought by the Petitioner. Through evaluation of comments on the February 2013 proposal and the SNPR, the EPA has taken into account the perspective of other stakeholders concerning the proper application of the CAA and the Agency's preliminary evaluation of the specific SIP provisions identified in the Petition. In many instances, the EPA has concluded that the Petitioner's analysis is correct and that the provision in question is inconsistent with CAA requirements for SIPs. For those SIP provisions, the EPA is granting the Petition and is simultaneously making a finding of substantial inadequacy and issuing a SIP call to the affected state to rectify the specific SIP inadequacy. In other instances, however, the EPA disagrees with the Petitioner's analysis of the provision, in some instances because the analysis applied to provisions that have since been corrected in the SIP. For those provisions, the EPA is therefore denying the Petition and taking no further action. In summary, the EPA is granting the Petition in part, and denying the Petition in part, with respect to all of the specific existing SIP provisions for which the Petitioner requested a remedy. The EPA's evaluation of each of the provisions identified in the Petition and the basis for the final action with respect to each provision is explained in detail in section IX of this document.

D. Response to Comments Concerning the CAA Requirements for SIP Provisions Applicable to SSM Events

The EPA received numerous comments, both supportive and adverse, concerning the Agency's decision to propose action on the Petition with respect to the overarching issues raised by the Petitioner. A number of these comments also raised important issues concerning the rights of citizens to petition their government, the process by which the EPA evaluated the issues raised in the Petition and the relative authorities and responsibilities of states and the EPA under the CAA. Many commenters raised the same conceptual issues and arguments. For clarity and ease of discussion, the EPA is responding to these overarching comments, grouped by topic, in this section of this document. The responses to more specific substantive issues raised by commenters on the EPA's interpretation of the CAA in the SSM Policy appear in other sections of this document that focus on particular aspects of this action.

1. Comments that the EPA should not have responded to the petition for rulemaking or that the EPA was wrong to do so.

Comment: Some commenters opposed the EPA's proposed action on the Petition in the February 2013 proposal entirely and alleged that it is "sue-and-settle rulemaking" or "regulation by litigation." Commenters stated that the "proposed rule and corresponding aggressive deadline schedule stem from" a settlement of litigation brought by Sierra Club to respond to the Petition.

Some commenters expressed concern that the EPA's proposed action was made in response to a settlement agreement, through a process that, the commenters alleged, did not permit any opportunity for participation by affected parties. Other commenters, believing that the EPA's proposed action was taken to fulfill a consent decree obligation, argued that consent decree deadlines "often do not allow EPA enough time to write quality regulations" or would not allow "opportunity to properly research and investigate the effect of State SSM provisions or the State's ability to meet the NAAQS, or to determine whether the SSM provisions are somehow inconsistent with the CAA." The commenters alleged that the process "bypasses the traditional rulemaking concepts of transparency and effective public participation" and "sidesteps the proper rulemaking channels and undercuts meaningful opportunities for those affected by the proposed rule to develop and present evidence that would support a competing and fully informed viewpoint on the substantive issues during the rulemaking process."

Response: The EPA believes that these comments reflect fundamental misunderstandings about this action. This is a rulemaking in which the EPA is taking action to respond to a petition for rulemaking, and it has undergone a full notice-and-comment rulemaking process as provided for in the CAA. In the February 2013 proposal, the EPA proposed to take action on the Petition. Under the CAA, the APA and the U.S. Constitution, citizens have the right to petition the government for redress. For example, the APA provides that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."[70] When citizens file a petition for rulemaking, they are entitled to a response to such petition—whether that response is to grant the petition, to deny the petition, or to partially grant and partially deny the petition as has occurred in this rulemaking action.

Some of these commenters expressed concern that the EPA's action on the Petition was the result of the Agency's obligations under a consent decree or settlement agreement and that this fact in some way invalidates the substantive action. First, the EPA notes that the action was undertaken not in response to a consent decree but rather in

[69] *See, e.g.*, 1983 SSM Guidance at Attachment p. 2.

[70] 5 U.S.C. 553(e).

under section 110.[76] Many commenters asserted that this federalism bar limits the EPA's oversight of state SIPs exclusively to whether a SIP will result in compliance with the NAAQS. The commenters evidently construe "compliance with the NAAQS" very narrowly to mean the SIP will factually result in attainment of the NAAQS, regardless of whether the SIP provisions in fact meet all applicable CAA requirements (*e.g.*, the requirement that the SIP emission limitations be continuous and enforceable). Accordingly, most of these commenters selectively quoted or cited a passage in *Train*,[77] and similar passages in circuit court opinions following *Train*, for the proposition that the EPA cannot issue a SIP call addressing the SIP provisions at issue in this SIP call action. Some of these commenters asserted that if the EPA were to finalize this action, the states would have "nothing left" of their discretion in SIP development and implementation in the future.

Response: The EPA agrees that the CAA establishes a framework for state-federal partnership based on cooperative federalism. The EPA does not, however, agree with the commenters' characterization of that relationship. The EPA explained its view of the cooperative-federalism structure in the February 2013 proposal, especially the fact that under this principle both states and the EPA have authorities and responsibilities with respect to implementing the requirements of the CAA.[78] The EPA believes that the commenters fundamentally misunderstand or inaccurately describe this action, as well as the "'division of responsibilities' between the states and the federal government" in section 110 that is described in the *Train-Virginia* line of cases.[79]

In CAA section 110(a)(1), Congress imposed the duty upon all states to have a SIP that provides for "the implementation, maintenance, and enforcement" of the NAAQS. In section 110(a)(2), Congress clearly set forth the basic SIP requirements that "[e]ach such plan *shall*" satisfy.[80] By using the mandatory "shall" in section 110(a)(2), Congress established a framework of mandatory requirements *within which* states may exercise their otherwise considerable discretion to design SIPs to provide for attainment and maintenance of the NAAQS and to meet other CAA requirements. In other sections of the Act, Congress also imposed additional, more specific SIP requirements (*e.g.*, the requirement in section 189 that states impose RACM-level emission limitations on sources located in $PM_{2.5}$ nonattainment areas).

In particular, this SIP call action concerns whether SIP provisions satisfy section 110(a)(2)(A), which requires that each SIP "[shall] include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter."

As explained in the February 2013 proposal, the automatic and discretionary exemptions for emissions from sources during SSM events at issue in this action fail to meet this most basic SIP requirement and are also inconsistent with the enforcement requirements of the CAA. Similarly, the enforcement discretion provisions at issue in this action that have the effect of barring enforcement by EPA or citizens fail to meet this requirement for enforceable emission limitations by interfering with the enforcement structure of the CAA as established by Congress. The affirmative defense provisions at issue are similarly inconsistent with the requirement that SIPs provide for enforcement of the NAAQS and also contravene the statutory jurisdiction of courts to determine liability and to impose remedies for violations of SIP requirements. Each of these types of deficient SIP provisions is thus inconsistent with legal requirements of the CAA for SIP provisions. Contrary to the claims of many commenters, the EPA has authority and responsibility to assure that a state's SIP provisions in fact comply with fundamental legal requirements of the CAA as part of the obligation to ensure that SIPs protect the NAAQS.[81]

The *Train-Virginia* line of cases affirms the plain language of the Act—that in addition to providing generally for attainment and maintenance of the NAAQS, all state SIPs must satisfy the specific elements outlined in section 110(a)(2). Even setting aside that *Train* predated substantive revisions to the CAA that strengthened section 110(a)(2)(A) in ways relevant here,[82] the *Train* Court clearly stated that section 110(a)(2) imposes additional requirements for state submissions to be accepted, independent of the general obligation to meet the NAAQS. Many commenters on the February 2013 proposal selectively quoted or cited only portions of the following excerpt from *Train*, omitting or ignoring the portions emphasized here:

> The Agency is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met. Under § 110(a)(2), the Agency is required to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, *and which also satisfies that section's other general requirements*. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations *if they are part of a plan which satisfies the standards of § 110(a)(2) . . . . Thus* [*i.e.*, provided the state plan satisfies the basic requirements of § 110(a)(2)], so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.[83]

[76] *See, e.g., Michigan* v. *EPA*, 213 F.3d 663, 687 (D.C. Cir. 2000).

[77] *See* 421 U.S. at 79.

[78] *See* 78 FR 12459 at 12468; Background Memorandum at 1–3.

[79] *See Virginia* v. *EPA*, 108 F.3d 1397, 1407 (D.C. Cir. 1997) (quoting *Train*, 421 U.S. at 79).

[80] Section 110(a)(2) (emphasis added); *see EPA* v. *EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1600 (2014) (holding that section 110(a)(2) "speaks without reservation" regarding what "components" a SIP "'shall' include"); H. Rept. 101–490, at 217 (calling the provisions of section 110(a)(2)(A) through (M) "the basic requirements of SIPs").

[81] The EPA notes that many of the specific SIP elements required in section 110(a)(2) are not themselves stated in terms of attainment and maintenance of the NAAQS. Instead, these requirements are part of the SIP structure that Congress deemed necessary to support implementation, maintenance and enforcement of the NAAQS, as well as to meet other objectives such as protection of PSD increments and visibility.

[82] For example, to the extent the *Train* Court was construing section 110(a)(2)'s emission limitation provision, it is important to note that while that statutory section before the *Train* Court required approvable SIPs to include certain controls "necessary to insure compliance with [the] primary or secondary standards" (*i.e.*, the NAAQS), *see* CAA of 1970, Pub. L. 91–604, section 4(a), 84 Stat. 1676, 1680 (December 31, 1970), that section now more broadly speaks of controls "necessary or appropriate *to meet the applicable requirements of this chapter*" (*i.e.*, the CAA). Section 110(a)(2)(A) (emphasis added). Among the other relevant textual changes are the qualification that emission limitations and other controls be "enforceable," *id.*; a statutory definition of "emission limitation" that adds requirements not contemplated by *Train*, *compare* Section 302(k), *with Train*, 421 U.S. at 78; as well as a recharacterization of section 110(a)(2)'s emission limitation requirement from one bearing on whether "[t]he Administrator shall approve such plan," *see* Pub. L. 91–604, section 4(a), 84 Stat. at 1680, to a requirement expressly directed at what "[e]ach plan shall" include.

[83] 421 U.S. at 79 (emphasis added) (footnotes omitted).

by requiring the states to meet legal requirements for SIP provisions, or that the EPA is prohibited from either interpreting 110(a)(2)'s basic requirements or reviewing state SIPs for compliance with those requirements. Accordingly, the EPA believes that to the extent that the DC Circuit's *EME Homer City* decision is relevant to this action, the decision in fact supports the basic principle that the EPA has authority and responsibility to assure that states comply with legal requirements of the CAA applicable to SIP provisions.

This view of what cooperative federalism prohibits is consistent with *Train,* where the U.S. Supreme Court stated that the EPA "is relegated by the [1970] Act to a secondary role in the process of determining and enforcing the *specific, source-by-source emission limitations* which are necessary if the national standards it has set are to be met." [97] It is also consistent with the *Virginia* decision, where the DC Circuit held that the EPA cannot under section 110 functionally require states to "adopt[] particular control measures" in a SIP but must rather ensure that states have a meaningful choice among alternatives.[98] Moreover, it is consistent with the court's view in *Michigan* v. *EPA,*[99] a case involving a SIP call, in which the DC Circuit interpreted and applied those precedents:

> Given the *Train* and *Virginia* precedent, the validity of the NOx budget program underlying the SIP call depends in part on whether the program in effect constitutes an EPA-imposed control measure or emission limitation triggering the *Train-Virginia* federalism bar: In other words, on whether the program constitutes an *impermissible source-specific means rather than a permissible end goal.* However, the program's validity also depends on whether EPA's budgets *allow the covered states real choice with regard to the control measure options available to them* to meet the budget requirements.[100]

Clearly, in this SIP call the EPA is leaving the states the freedom to correct the inappropriate provisions in any manner they wish as long as they comply with the constraints of section 110(a)(2).

Finally, this view is consistent with *Appalachian Power Co.* v. *EPA,* where the DC Circuit reiterated that *Virginia* "disapproved the EPA's plan to reject SIPs that did not incorporate *particular limits* upon emissions from new cars." [101] The specific controls discussed in these cases are quite different, both as a legal matter and functionally, from the statutory constraints on the states' exercise of discretion that the EPA is interpreting and applying in this action.[102]

As explained in the February 2013 proposal, in this action the EPA is not requiring states to adopt any particular emission limitation or to impose a specific control measure in a SIP provision; the EPA is merely directing the states to address the fundamental statutory requirements that all SIP provisions must meet.[103] This SIP call outlines the principles and framework for how states can revise the existing deficient SIP provisions to meet a permissible end goal [104]—compliance with the Act. In so doing, the EPA is merely acting pursuant to its supervisory role under the CAA's cooperative-federalism framework, to ensure that SIPs satisfy those broad requirements that section 110(a)(2) mandates SIPs "shall" satisfy. With respect to section 110(a)(2)(A), this means that a SIP must at least contain legitimate, enforceable emission limitations to the extent they are necessary or appropriate "to meet the applicable requirements" of the Act. SIPs cannot contain unbounded director's discretion provisions that functionally subvert the requirements of the CAA for approval and revision of SIP provisions. Likewise, SIPs cannot have enforcement discretion provisions or affirmative defense provisions that contravene the fundamental requirements concerning the enforcement of SIP provisions. Accordingly, the EPA believes that this SIP call fully accords with the federal-state partnership outlined in section 110, by providing the states meaningful latitude when developing SIP submissions, while "'nonetheless subject[ing] the States to strict minimum compliances requirements' and giv[ing] EPA the authority to determine a state's compliance with those requirements." [105]

The EPA emphasizes that this action also allows states "real choice" concerning their SIP provisions, so long as the provisions are consistent with applicable requirements. For example, this SIP call does not establish any specific, source-by-source limitations. To the contrary, as described in section VII.A of this document, emission limitations meeting the requirements of section 110(a)(2)(A) may take a variety of forms. Under section 110(a)(2)(A), states are free to include in their SIPs whatever emission limitations they wish, provided the states comply with applicable legal requirements. Among those requirements are that an emission limitation in a SIP must be an "emission limitation" as defined in section 302(k) and that all controls—emission limitations and otherwise—must be sufficiently "enforceable" to ensure compliance with applicable CAA requirements. The SSM provisions at issue in this SIP call subvert both of these legal requirements.

3. Comments that the EPA should expand the rulemaking to include additional SIP provisions that the commenters consider deficient with respect to SSM issues.

Comment: Some commenters requested that the EPA expand its February 2013 proposed action to include additional SIP provisions that the commenters consider deficient with respect to SSM issues. Specifically, commenters identified additional SIP provisions in Wisconsin (a state not identified by the Petitioner) and New Hampshire (a state for which the Petitioner did specifically identify other SIP provisions).

One commenter argued that "[i]t would substantially ease the administrative burden on EPA as well on public commenters" and "ensure that companies in all states are treated equally" if the EPA were to include "all SIPs with faulty SSM provisions in [a] consolidated SIP call." Another commenter noted that "the interests of regulatory efficiency will be served" by adding additional SIP provisions to the SIP call because "all changes required by the policy underlying this rulemaking" to state SIPs would then be made at once.

Response: The EPA acknowledges the requests made by the commenters concerning additional SIP provisions that may be inconsistent with CAA

[97] 421 U.S. at 79 (emphasis added).

[98] *Virginia* v. *EPA,* 108 F.3d 1397, 1415 (D.C. Cir. 1997) (holding that functionally, in that case, "EPA's alternative is no alternative at all"); *see also Appalachian Power Co.* v. *EPA,* 249 F.3d 1032, 1047 (D.C. Cir. 2001) (citing *Virginia,* 108 F.3d at 1406, 1410) ("We did not suggest [in *Virginia*] that under § 110 states may develop their plans free of extrinsic legal constraints. Indeed, SIP development . . . commonly involves decisionmaking subject to various legal constraints.").

[99] 213 F.3d 663 (D.C. Cir. 2000).

[100] *Id.* at 687 (emphasis added).

[101] 249 F.3d 1032, 1047 (D.C. Cir. 2001) (citing *Virginia,* 108 F.3d at 1410) (emphasis added).

[102] *See id.*

[103] 78 FR 12459 at 12489.

[104] *See, e.g., Michigan,* 213 F.3d at 687.

[105] *Michigan* v. *EPA,* 213 F.3d 663, 687 (D.C. Cir. 2000) (quoting *Union Elec. Co.* v. *EPA,* 427 U.S. 246, 256–57 (1976)); *see Mont. Sulphur & Chem. Co.* v. *United States EPA,* 666 F.3d 1174, 1181 (9th Cir. 2012), *cert. denied,* 133 S. Ct. 409 (2012) ("The Clean Air Act gives the EPA significant national oversight power over air quality standards, to be exercised pursuant to statutory specifications, and provides the EPA with regulatory discretion in key respects relevant to SIP calls and determinations about the attainment of NAAQS.").

unless there is a specific statutory mandate that it do so.[112] In addition, the EPA has authority under section 301 to promulgate such regulations as it deems necessary to implement the CAA (*e.g.*, to fill statutory gaps left by Congress for the EPA to fill or to clarify ambiguous statutory language). With respect to SIP requirements, however, the EPA has elected to promulgate regulations or to issue guidance to states to address different requirements, as appropriate.[113] In short, there is no specific statutory requirement that the EPA promulgate regulations with respect to the types of deficiencies in SIP provisions at issue in this action prior to issuing a SIP call.

Second, the EPA has historically elected to address the key issues relevant to this SIP call action in guidance. Through a series of guidance documents, issued in 1982, 1983, 1999 and 2001, the EPA has previously explained its interpretations of the CAA with respect to SIP provisions that contain automatic SSM exemptions, discretionary SSM exemptions, the exercise of enforcement discretion for SSM events and affirmative defenses for SSM events. Starting in the 1982 SSM Guidance, the EPA explicitly acknowledged that it had previously approved some SIP provisions related to emissions during SSM events that it should not have, because the provisions were inconsistent with requirements for SIPs. In addition, the EPA has in rulemakings applied its interpretation of the CAA with respect to issues such as exemptions for emissions during SSM events, and these actions have been approved by courts.[114] Under these circumstances, the EPA does not agree that promulgation of generally applicable regulations was necessary to put states on notice of the Agency's interpretation of the CAA with respect to these issues, prior to issuance of a SIP call.

Finally, the EPA's authority under section 110(k)(5) is not limited, expressly or otherwise, solely to inadequacies related to regulatory requirements. To the contrary, section 110(k)(5) refers broadly to attainment and maintenance of the NAAQS, adequate mitigation of interstate transport and compliance with "any requirement of" the CAA. In addition, section 110(k)(5) specifically contemplates situations such as this one, "whenever" the EPA finds previously approved SIP provisions to be deficient. Nothing in the CAA requires the EPA to conduct a separate rulemaking clarifying its interpretation of the CAA prior to issuance of this SIP call. For the types of deficiencies at issue in this action, the EPA believes that the statutory requirements of the CAA itself and recent court decisions concerning those statutory provisions provide sufficient basis for this SIP call.

For the foregoing reasons, the EPA disagrees that before requiring states to revise SIPs that contain provisions with SSM exemptions, the EPA first must promulgate regulations explicitly stating that such exemptions are impermissible under the CAA. In addition, the EPA notes that although it is not promulgating generally applicable regulations in this action, it is nonetheless revising its guidance in the SSM Policy through rulemaking and has thereby provided states and other parties the opportunity to comment on the Agency's interpretation of the CAA with respect to this issue.

5. Comments that the EPA did not provide a sufficiently long comment period on the proposal in general or as contemplated in Executive Order 13563.

Comment: A number of commenters argued that the comment period provided by the EPA for the February 2013 proposal was "at odds with" Executive Order 13563. The commenters alleged that the comment period was "unconscionably short," even so short as to be "arbitrary and capricious" because, in order to provide comments, "impacted States and industries must perform the data collection and analysis necessary to evaluate the need for the proposed rule and its impacts." Further, the commenters alleged, the "EPA's failure and refusal to perform any technical analyses of the feasibility of source operations after the elimination of SSM provisions or the likely capital and operating costs of additional control equipment required to meet numeric standards during all operational periods has denied the States, the affected parties, and the public a meaningful opportunity to evaluate and comment upon the proposed rule." Finally, one commenter asserted that Executive Order 13563 requires that "[b]efore issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected."[115] The commenter claimed that because the EPA allegedly "failed to seek the views of those who are likely to be affected and those who are potentially subject to such rulemaking, EPA's actions ignore the requirements of the Executive Order."

Response: The EPA disagrees that it has not provided sufficiently long comment periods to address the specific issues relevant to this action. As described in section IV.D.1 of this document, the EPA has followed all steps of a notice-and-comment rulemaking, as governed by applicable statutes, regulations and executive orders, including a robust process for public participation. When the EPA initially proposed to take action on the Petition, in February 2013, it simultaneously solicited public comment on all aspects of its proposed response to the issues in the Petition and in particular on its proposed action with respect to each of the specific existing SIP provisions identified by the Petitioner as inconsistent with the requirements of the CAA. In response to requests, the EPA extended the public comment period for this proposal to May 13, 2013, which is 80 days from the date the proposed rulemaking was published in the **Federal Register** and 89 days from the date the proposed rulemaking was posted on the EPA's Web site.[116] The EPA deemed this extension appropriate because of the issues raised in the February 2013 proposal. The EPA also held a public hearing on March 12, 2013. In response to this proposed action, the EPA received approximately 69,000 public comments, including over 50 comment letters from state and local governments, over 150 comment letters from industry commenters, over 25 comment letters from public interest groups and many thousands of comments from individual commenters. Many of these comment

[112] *See, e.g.*, CAA section 169A(a)(4) (requiring the EPA to promulgate regulations governing the requirements relevant to SIP requirements for purposes of regional haze reduction).

[113] *See, e.g.*, "State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990," 57 FR 13498 (April 16, 1992) (the "General Preamble" that continues to provide guidance recommendations to states for certain attainment plan requirements for various NAAQS); 40 CFR part 51, subpart Z (imposing regulatory requirements for certain attainment plan requirements for the 1997 $PM_{2.5}$ NAAQS).

[114] *See, e.g., Michigan* v. *EPA*, 213 F.3d 663 (D.C. Cir. 2000) (upholding the "NO_X SIP Call" to states requiring revisions to previously approved SIPs with respect to ozone transport and section 110(a)(2)(D)(i)(I)); "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision," 74 FR 21639 (April 18, 2011) (the EPA issued a SIP call to rectify SIP provisions dating back to 1980).

[115] *See* E.O. 13563 section 2(c).

[116] *See* "State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Notice of extension of public comment period," 78 FR 20855 (April 8, 2013), in the rulemaking docket at EPA–HQ–OAR–2012–0322–0126.

meetings and conference calls with states and organizations that represent state and local air regulators.

6. Comments that this action is not "nationally applicable" for purposes of judicial review.

Comment: Commenters alleged that the SSM SIP call is not "nationally applicable" for purposes of judicial review. One state commenter cited *ATK Launch Systems* for the proposition that the specific language of the regulation being challenged indicates whether an action is nationally or locally/regionally applicable. Because a SIP provision subject to this SIP call is state-specific, the commenter argued, it is of concern only for that state and thus the SIP call is a locally applicable action.[120]

Response: The EPA disagrees with the commenter that the SIP call is not a nationally applicable action. In this action, the EPA is responding to a Petition that requires the Agency to reevaluate its interpretations of the CAA in the SSM Policy that apply to SIP provisions for all states across the nation. In so doing, the EPA is reiterating its interpretations with respect to some issues (*e.g.*, that SIP provisions cannot include exemptions for emissions during SSM events) and revising its interpretations with respect to others (*e.g.*, so that SIP provisions cannot include affirmative defenses for emissions during SSM events). In addition to reiterating and updating its interpretations with respect to SIP provisions in general, the EPA is also applying its interpretations to specific existing provisions in the SIPs of 41 states. Through this action the EPA is establishing a national policy that it is applying to states across the nation. As with many nationally applicable rulemakings, it is true that this action also has local or regional effects in the sense that EPA is requiring 36 individual states to submit revisions to their SIPs. However, through this action the EPA is applying the same legal and policy interpretation to each of these states. Thus, the underlying basis for the SIP call has "nationwide scope and effect" within the meaning of section 307(b)(1) as explained by the EPA in the February 2013 proposal. A key purpose of the CAA in channeling to the D.C. Circuit challenges to EPA rulemakings that have nationwide scope and effect is to minimize instances where the same legal and policy basis for decisions may be challenged in multiple courts of appeals, which instances would potentially lead to inconsistent judicial holdings and a patchwork application of the CAA across the country. We note that in the *ATK Launch* case cited by commenters, the U.S. Court of Appeals for the Tenth Circuit (Tenth Circuit) in fact transferred to the D.C. Circuit challenges to the designation of two areas in Utah that were part of a national rulemaking designating areas across the U.S. for the $PM_{2.5}$ NAAQS. In transferring the challenges to the D.C. Circuit, the Tenth Circuit noted that the designations rulemaking "reached areas coast to coast and beyond" and that the EPA had applied a uniform process and standard.[121] Significantly, in support of its decision to transfer the challenges to the D.C. Circuit, the Tenth Circuit stated: "The challenge here is more akin to challenges to so-called 'SIP Calls,' which the Fourth and Fifth Circuits have transferred to the D.C. Circuit . . . Although each of the SIP Call petitions challenged the revision requirement as to a particular state, the SIP Call on its face applied the same standard to every state and mandated revisions based on that standard to states with non-conforming SIPs in multiple regions of the country." [122]

7. Comments that the EPA was obligated to address and justify the potential costs of the action and failed to do so correctly.

Comment: Several commenters alleged that the EPA has failed to address the costs associated with this rulemaking action appropriately and consistent with legal requirements. In particular, commenters alleged that the EPA is required to address costs of various impacts of this SIP call, including the costs that may be involved in changes to emissions controls or operation at sources and the costs to states to revise permits and revise SIPs in response to the SIP call.

Commenters also alleged that the EPA has failed to comply with Executive Order 12291, Executive Order 12866, Executive Order 13211, the Regulatory Flexibility Act and the Unfunded Mandates Reform Act.

One commenter supported the EPA's approach with respect to cost.

Response: The EPA disagrees with commenters concerning its compliance with the Executive Orders and statutes applicable to agency rulemaking in general. The EPA maintains that it did properly consider the costs imposed by this SIP call action, as required by law. As explained in the February 2013 proposal, to the extent that the EPA is issuing a SIP call to a state under section 110(k)(5), the Agency is only requiring a state to revise its SIP to comply with existing requirements of the CAA. The EPA's action, therefore, would leave to states the choice of how to revise the SIP provision in question to make it consistent with CAA requirements and of determining, among other things, which of several lawful approaches to the treatment of excess emissions during SSM events will be applied to particular sources. Therefore, the EPA considers the only direct costs of this rulemaking action to be those to states associated with preparation and submission of a SIP revision by those states for which the EPA issues a SIP call.[123] Examples of such costs could include development of a state rule, conducting notice and public hearing and other costs incurred in connection with a SIP submission. The EPA notes that it did not consider the costs of potential revisions to operating permits for sources to be a direct cost imposed by this action, because, as stated elsewhere in this document, the Agency anticipates that states will elect to delay any necessary revision of permits until the permits need to be reissued in the ordinary course after revision of the underlying SIP provisions.

The commenters also incorrectly claim that the EPA failed to comply with Executive Order 12291. That Executive Order was explicitly revoked by Executive Order 12866, which was signed by President Clinton on September 30, 1993.

The commenters are likewise incorrect that the EPA did not comply with Executive Order 12866. This action was not deemed "significant" on a basis of the cost it will impose as the commenters claimed. The EPA has already concluded that this action will not result in a rule that may have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, of state, local or tribal governments or communities. The EPA instead determined that, as noted in both the February 2013 proposal (section X.A) and the SNPR (section VIII.A), this action is a "significant regulatory action" as that term is defined in Executive Order 12866 because it raises novel legal or policy issues. Accordingly, it was on that basis that the EPA submitted the February 2013 proposal, the SNPR and the final action to the Office of Management and Budget (OMB) for review. Changes made

[120] *See ATK Launch Systems, Inc.* v. *EPA*, 651 F.3d 1194 (10th Cir. 2011).

[121] *Id.*, 651 F.3d at 1197.

[122] *Id.*, 651 F.3d at 1199.

[123] *See* Memorandum, "Estimate of Potential Direct Costs of SSM SIP Calls to Air Agencies," April 28, 2015, in the rulemaking docket.

inefficient." [127] The Petitioner cited various past rulemaking actions to illustrate how EPA approval of ambiguous SIP provisions can inject unintended confusion for regulated entities, regulators, and the public in the future, especially in the context of future enforcement actions. Accordingly, the Petitioner requested that the EPA discontinue reliance upon interpretive letters when approving state SIP submissions, regardless of the circumstances. A more detailed explanation of the Petitioner's arguments appears in the 2013 February proposal.[128]

B. What the EPA Proposed

In the February 2013 proposal, the EPA proposed to deny the Petition with respect to this issue. The EPA explained the basis for this proposed disapproval in detail, including a discussion of the statutory provisions that the Agency interprets to permit this approach, an explanation of why this approach makes sense from both a practical and an efficiency perspective under some circumstances, and a careful explanation of the process by which EPA intends to rely on interpretive letters in order to assure that the concerns of the Petitioner with respect to potential future disputes about the meaning of SIP provisions should be alleviated.

C. What is being finalized in this action?

The EPA is taking final action to deny the Petition on this request. The EPA believes that it has statutory authority to rely on interpretive letters to resolve ambiguity in a SIP submission under appropriate circumstances and so long as the state and the EPA follow an appropriate process to assure that the rulemaking record properly reflects this reliance. To avoid any misunderstanding about the reasons for this denial or any misunderstandings about the circumstances under which, or the proper process by which, the EPA intends to rely interpretive letters, the Agency is repeating its views in this final action in detail.

As stated in the February 2013 proposal, the EPA agrees with the core principle advocated by the Petitioner, *i.e.*, that the language of regulations in SIPs that pertain to SSM events should be clear and unambiguous. This is necessary as a legal matter but also as a matter of fairness to all parties, including the regulated entities, the regulators, and the public. In some cases, the lack of clarity may be so significant that amending the state's regulation may be warranted to eliminate the potential for confusion or misunderstanding about applicable legal requirements that could interfere with compliance or enforcement. Indeed, as noted by the Petitioner, the EPA has requested that states clarify ambiguous SIP provisions when the EPA has subsequently determined that to be necessary.[129]

However, the EPA believes that the use of interpretive letters to clarify ambiguity or perceived ambiguity in the provisions in a SIP submission is a permissible, and sometimes necessary, approach under the CAA. Used correctly, and with adequate documentation in the **Federal Register** and the docket for the underlying rulemaking action, reliance on interpretive letters can serve a useful purpose and still meet the enforceability concerns of the Petitioner. So long as the interpretive letters and the EPA's reliance on them is properly explained and documented, regulated entities, regulators, and the public can readily ascertain the existence of interpretive letters relied upon in the EPA's approval that would be useful to resolve any perceived ambiguity. By virtue of being part of the stated basis for the EPA's approval of that provision in a SIP submission, the interpretive letters necessarily establish the correct interpretation of any arguably ambiguous SIP provision. In other words, the rulemaking record should reflect the shared state and EPA understanding of the meaning of a provision at issue at the time of the approval, which can then be referenced should any question about the provision arise in a future enforcement action.

In addition, reliance on interpretive letters to address concerns about perceived ambiguity can often be the most efficient and timely way to resolve concerns about the correct meaning of regulatory provisions. Both air agencies and the EPA are required to follow time- and resource-intensive administrative processes in order to develop and evaluate SIP submissions. It is reasonable for the EPA to exercise its discretion to use interpretive letters to clarify concerns about the meaning of regulatory provisions, rather than to require air agencies to reinitiate a complete administrative process merely to resolve perceived ambiguity in a provision in a SIP submission.[130] In particular, the EPA considers this an appropriate approach where reliance on such an interpretive letter allows the air agency and the EPA to put into place SIP provisions that are necessary to meet important CAA objectives and for which unnecessary delay would be counterproductive. For example, where an air agency is adopting emission limitations for purposes of attaining the NAAQS in an area, a timely letter from the air agency clarifying that an enforcement discretion provision is applicable only to air agency enforcement personnel and has no bearing on enforcement by the EPA or the public could help to assure that the provision is approved into the SIP promptly and thus allow the area to reach attainment more expeditiously than requiring the air agency to undertake a time-consuming administrative process to make a minor clarifying change in the regulatory text.

There are multiple reasons why the EPA does not agree with the Petitioner with respect to the alleged inadequacy of using interpretive letters to clarify specific ambiguities in a SIP submission and the SIP provisions that may ultimately result from approval of such a submission, provided this process is done correctly. First, under section 107(a), the CAA gives air agencies both the authority and the primary responsibility to develop SIPs that meet applicable statutory and regulatory requirements. However, the CAA generally does not specify exactly how air agencies are to meet the requirements substantively, nor does the CAA specify that air agencies must use specific regulatory terminology, phraseology, or format, in provisions submitted in a SIP submission. Air agencies each have their own requirements and practices with respect to rulemaking, making flexibility respecting terminology on the EPA's part appropriate, so long as CAA requirements are met.

As a prime example relevant to the SSM issue, CAA section 110(a)(2)(A) requires that a state's SIP shall include "enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights) as well as schedules and

[127] Petition at 15.

[128] *See* February 2013 proposal, 78 FR 12459 at 12474 (February 22, 2013).

[129] *See, e.g.*, "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision," 76 FR 21639 at 21648 (April 18, 2011).

[130] CAA section 110(k) directs the EPA to act on SIP submissions and to approve those that meet statutory and regulatory requirements. Implicit in this authority is the discretion, through appropriate notice-and-comment rulemaking, to determine whether a given SIP provision meets such requirements, in reliance on the information that the EPA considers relevant for this purpose.

approval and remain available should they be needed in the future for any purpose. To the extent that there is any question about the correct interpretation of an ambiguous provision in the future, an interested party will be able to access the docket to verify the correct meaning of SIP provisions.

With regard to the Petitioner's concern that either actual or alleged ambiguity in a SIP provision could impede an effective enforcement action, the EPA believes that its current process for evaluating SIP submissions and resolving potential ambiguities, including the reliance on interpretive letters in appropriate circumstances with correct documentation in the rulemaking action, minimizes the possibility for any such ambiguity in the first instance. To the extent that there remains any perceived ambiguity, the EPA concludes that regulated entities, regulators, the public, and ultimately the courts, have recourse to use the administrative record to shed light on and resolve any such ambiguity as explained earlier in this document.

The EPA emphasizes that it is already the Agency's practice to assure that any interpretive letters are correctly and adequately reflected in the **Federal Register** and are included in the rulemaking docket for a SIP approval. Should the Petitioner or any other party have concerns about any ambiguity in a provision in a SIP submission, the EPA strongly encourages that they bring this ambiguity to the Agency's attention during the rulemaking action on the SIP submission so that it can be addressed in the rulemaking process and properly reflected in the administrative record. Should an ambiguity come to light later, the EPA encourages the Petitioner or any other party to bring that ambiguity to the attention of the relevant EPA Regional Office. If the Agency agrees that there is ambiguity in a SIP provision that requires clarification subsequent to final action on the SIP submission, then the EPA can work with the relevant air agency to resolve that ambiguity by various means.

D. Response to Comments Concerning Reliance on Interpretive Letters in SIP Revisions

The EPA received relatively few comments, both supportive and adverse, concerning the Agency's overarching decision to deny the Petition with respect to this issue. For clarity and ease of discussion, the EPA is responding to these comments, grouped by whether they were supportive or adverse, in this section of this document.

1. Comments that supported the EPA's interpretation of the CAA to allow reliance on interpretive letters to clarify ambiguities in state SIP submissions.

Comment: A number of state and industry commenters agreed with the EPA that the use of interpretive letters to clarify perceived ambiguity in the provisions in a SIP is a permissible, and sometimes necessary, approach to approving SIP submissions under the CAA when done correctly. Those commenters who supported the EPA's proposed action on the Petition did not elaborate upon their reasoning, but generally supported it as an efficient and reasonable approach to resolve ambiguities.

Response: The EPA agrees with the commenters who expressed support of the proposal based on practical considerations such as efficiency. These commenters did not, however, base their support for the proposed action on the EPA's interpretation of the CAA in the February 2013 proposal, nor did they acknowledge the parameters that the EPA itself articulated concerning the appropriate situations for such reliance and the process by which such reliance is appropriate. Thus, the EPA reiterates that reliance on interpretive letters to resolve ambiguities or perceived ambiguities in SIP submissions must be weighed by the Agency on a case-by-case basis, and such evaluation is dependent upon the specific facts and circumstances present in a specific SIP action and would follow the process described in the proposal.

2. Comments that opposed the EPA's interpretation of the CAA to allow reliance on interpretive letters to clarify ambiguities in state SIP submissions.

Comment: Other commenters disagreed with the EPA's proposed response to the Petition on this issue. One commenter opposed the Agency's reliance on interpretive letters under any circumstances and did not draw any factual or procedural distinctions between situations in which this approach might or might not be appropriate or correctly processed. This commenter argued that citizens should not be required "to sift through a large and complex rulemaking docket in order to figure out the meaning and operation of state regulations." The commenter asserted that simply as a matter of "good government," all state regulations approved as SIP provisions should be clear and unambiguous on their face. This commenter also expressed concern that courts could not or would not accord legal weight to interpretive letters created after state regulations were adopted and submitted to the EPA, or after the EPA's approval of the SIP submission occurred, and would view such letters as *post hoc* interpretations of no probative value. Another commenter added its view that reliance on interpretive letters is appropriate only when affected parties have the right to comment on the interpretive letters and the EPA's proposed use of them during the rulemaking in which the EPA relies on such letters to resolve ambiguities and before the Agency finally approves the SIP revision.

Response: As a general matter, the commenter opposing the EPA's reliance on interpretive letters in any circumstances because citizens would be required "to sift through" the docket did not provide specific arguments regarding the EPA's interpretation of the statute as stated in the February 2013 proposal. Consistent with the EPA's interpretation of the CAA, and as explained earlier in this document, the EPA agrees with the core principle that the language of regulations in SIPs that pertain to SSM events should be clear and unambiguous. A commenter argued that "a fundamental principle of good government is making sure that all people know what the applicable law is. Having the applicable law manifest in a letter sitting in a filing cabinet in one office clearly does not qualify as good government." The EPA generally agrees on this point as well. As explained earlier in this document, the EPA allows the use of interpretive letters to clarify perceived ambiguity in the provisions of a SIP submission only when used correctly, with adequate documentation in both the **Federal Register** and the docket for the underlying rulemaking action. Section VI.B of this document explains how interested parties can use the list or table of actions that appears in the CFR and that reflects the various components of the approved SIP, to identify the **Federal Register** document wherein the EPA has explained the basis for its decision on any individual SIP provision. As such, the EPA does not envision a scenario whereby a citizen or a court would be unable to determine how the air agency and the EPA interpreted a specific SIP provision at the time of its approval into the SIP. Assuming there is any ambiguity in the provision, the mutual understanding of the state and the EPA as to the proper interpretation of that provision would be clear at the time of the approval of the SIP revision, as reflected in the **Federal Register** document for the final rule and the docket supporting that rule, which should answer any question about the correct interpretation of the term.

The same commenter also questioned whether "courts can or will give any

provisions, as articulated in this rulemaking, is appropriate.

VII. Clarifications, Reiterations and Revisions to the EPA's SSM Policy

A. Applicability of Emission Limitations During Periods of SSM

1. What the EPA Proposed

In the February 2013 proposal, the EPA reiterated its longstanding interpretation of the CAA that SIP provisions cannot include exemptions from emission limitations for excess emissions during SSM events. This has been the EPA's explicitly stated interpretation of the CAA with respect to SIP provisions since the 1982 SSM Guidance, and the Agency has reiterated this important point in the 1983 SSM Guidance, the 1999 SSM Guidance and the 2001 SSM Guidance. In accordance with CAA section 302(k), SIPs must contain emission limitations that "limit the quantity, rate, or concentration of emissions of air pollutants on a continuous basis." Court decisions confirm that this requirement for continuous compliance prohibits exemptions for excess emissions during SSM events.[138]

2. What Is Being Finalized in This Action

For the reasons explained in the February 2013 proposal, in the background memorandum supporting that proposal and in the EPA's responses to comments in this document, the EPA interprets the CAA to prohibit exemptions for excess emissions during SSM events in SIP provisions. This interpretation has long been reflected in the SSM Policy. The EPA acknowledges, however, that both states and the Agency have failed to adhere to the CAA consistently with respect to this issue in some instances in the past, and thus the need for this SIP call action to correct the existing deficiencies in SIPs. In order to be clear about this important point on a going-forward basis, the EPA is reiterating that emission limitations in SIP provisions cannot contain exemptions for emissions during SSM events.

Many commenters wrongly asserted that the EPA declared in the February 2013 proposal that all emission limitations in SIPs must be established as numerical limitations, or must be set at the same numerical level at all times. The EPA did not take this position. In the case of section 110(a)(2)(A), the statute does not include an explicit requirement that all SIP emission limitations must be expressed numerically. In practice, it may be that numerical emission limitations are the most appropriate from a regulatory perspective (*e.g.*, to be legally and practically enforceable) and thus the limitation would need to be established in this form to meet CAA requirements. The EPA did not, however, adopt the position ascribed to it by commenters, *i.e.*, that SIP emission limitations must always be expressed only numerically and must always be set at the same numerical level during all modes of source operation.

The EPA notes that some provisions of the CAA that govern standard-setting limit the EPA's own ability to set non-numerical standards.[139] Section 110(a)(2)(A) does not contain comparable explicit limits on non-numerical forms of emission limitation. Presumably, however, some commenters misunderstood the explicit statutory requirement for emission limitations to be "continuous" as a requirement that states must literally establish SIP emission limitations that would apply the same precise numerical level at all times. Evidently these commenters did not consider the explicit recommendations that the EPA made in the February 2013 proposal concerning creation of alternative emission limitations in SIP provisions that states may elect to apply to sources during startup, shutdown or other specifically defined modes of source operation.[140] As many of the commenters acknowledged, the EPA itself has recently promulgated emission limitations in NSPS and NESHAP regulations that impose different numerical levels during different modes of source operation or impose emission limitations that are composed of a combination of a numerical limitation during some modes of operation and a specific technological control requirement or work practice requirement during other modes of operation. In light of the court's decision in *Sierra Club* v. *Johnson*, the EPA has been taking steps to assure that its own regulations impose emission limitations that apply continuously, including during startup and shutdown, as required.[141]

Regardless of the reason for the commenters' apparent misunderstanding on this point, many of the commenters used this incorrect premise as a basis to argue that "continuous" SIP emission limitations may contain total exemptions for all emissions during SSM events. Therefore, in this final action the EPA wishes to be very clear on this important point, which is that SIP emission limitations: (i) Do not need to be numerical in format; (ii) do not have to apply the same limitation (*e.g.*, numerical level) at all times; and (iii) may be composed of a combination of numerical limitations, specific technological control requirements and/or work practice requirements, with each component of the emission limitation applicable during a defined mode of source operation. It is important to emphasize, however, that regardless of how the air agency structures or expresses a SIP emission limitation—whether solely as one numerical limitation, as a combination of different numerical limitations or as a combination of numerical limitations, specific technological control requirements and/or work practice requirements that apply during certain modes of operation such as startup and shutdown—the emission limitation as a whole must be continuous, must meet applicable CAA stringency requirements and must be legally and practically enforceable.[142]

Another apparent common misconception of commenters was that SIP provisions may contain exemptions for emissions during SSM events, so long as there is some other generic regulatory requirement of some kind somewhere else in the SIP that coincidentally applies during those exempt periods. The other generic regulatory requirements most frequently referred to by commenters are "general duty" type requirements, such as a general duty to minimize emissions at all times, a general duty to use good engineering judgment at all times, or a

[138] *See, e.g., Sierra Club* v. *Johnson*, 551 F.3d 1019, 1021 (D.C. Cir. 2008) (interpreting the definition of emission limitation in section 302(k) and section 112); *Mich. Dep't of Envtl. Quality* v. *Browner*, 230 F.3d 181 (6th Cir. 2000) (upholding disapproval of SIP provisions because they contained exemptions applicable to SSM events); *US Magnesium, LLC* v. *EPA*, 690 F.3d 1157, 1170 (10th Cir. 2012) (upholding the EPA's issuance of a SIP call to a state to correct SSM-related deficiencies).

[139] *See, e.g.*, CAA section 112(h)(1) (authorizing design, equipment, work practice, or other operational emission limitations under certain conditions); 40 CFR 51.308(e)(1)(iii) (regulations applicable to regional haze plans).

[140] *See* February 2013 proposal, 78 FR 12459 at 12478 (February 22, 2013) (the recommended criteria for consideration in creation of SIP provisions that apply during startup and shutdown).

[141] 551 F.3d 1019 (D.C. Cir. 2008).

[142] The EPA notes that CAA section 123 explicitly prohibits certain intermittent or supplemental controls on sources. In a situation where an emission limitation is continuous, by virtue of the fact that it has components applicable during all modes of source operation, the EPA would not interpret the components that applied only during certain modes of operation, *e.g.*, startup and shutdown, to be prohibited intermittent or supplemental controls.

in the general provisions applicable to the emission limitations in the Agency's own NSPS for Fossil-Fuel-Fired Steam Generators in 40 CFR part 60, subpart D, is evidence that exemptions for emissions during SSM events are permitted by the CAA.

The EPA acknowledges that correction of longstanding regulatory deficiencies by proper rulemaking procedures requires time and resources, not only for the EPA but also for states and affected sources. Hence, the EPA has elected to proceed via its authority under section 110(k)(5) and to provide states with the full 18 months allowed by statute for compliance with this action. This SIP call is intended to help assure that state SIP provisions are brought into line with CAA requirements for emission limitations, just as the EPA is undertaking a process to update its own regulations.

The EPA also specifically disagrees with the commenters' implication that 40 CFR 60.11(d) completely excuses noncompliance during periods of startup and shutdown. Rather, that provision imposes a separate affirmative obligation to maintain and operate the affected facility, including associated air pollution control equipment, in a manner consistent with good air pollution control practices at all times. The existence of this separate duty to minimize emissions, however, does not justify or excuse the existence of an exemption for emissions during SSM events from the emission limitations of an EPA NSPS. It is a separate obligation that sources must also meet at all times.

The EPA also disagrees with the commenters who argued that the Agency has recently created new exemptions for PM emissions during startup and shutdown events in the NSPS for Electric Utility Steam Generating Units in 40 CFR part 60, subpart Da. The EPA has not created new exemptions for emissions during startup and shutdown. To the contrary, the EPA has taken steps to assure that these regulations are consistent with the statutory definition of emission limitation and with the logic of the *Sierra Club* decision on a going-forward basis. In accordance with that decision, the revised emission limitations in subpart Da NSPS apply continuously. In revising subpart Da to establish requirements for sources on which construction, modification or reconstruction commenced after May 3, 2011, the EPA determined that it was appropriate to provide that the exemptions for emissions during SSM events in the General Provisions do not apply.[146] Although the *Sierra Club* v. *Johnson* decision specifically addressed the validity of SSM exemptions in NESHAP regulations, the EPA concluded that the court's focus on the definition of "emission limitation" in section 302(k) applied equally to any such SSM exemptions in NSPS regulations. Thus, for affected sources on which construction, modification or reconstruction starts after May 3, 2011, the General Provisions do not provide an exemption to compliance with the applicable emission limitations during SSM events.

For such sources, the emission limitation for PM in 40 CFR 60.42Da(a) imposes a numerical level of 0.03 lb/MMBtu that applies at all times except during startup and shutdown and specific work practices that apply during startup and shutdown.[147] The related emission limitation for opacity from such sources in 40 CFR 60.42Da(b) is 20 percent opacity at all times, except for one 6-minute period per hour of not more than 27 percent, and it applies at all times except during periods of startup and shutdown when the work practices for PM limit opacity. Commenters alleged that the EPA created an "exemption" from the PM emission limitations in subpart Da applicable to post-May 3, 2011, affected sources. That is simply incorrect. The revised regulations in subpart Da impose a numerical emission limitation that applies at all times except during startup and shutdown and impose specific work practice requirements that apply during startup and shutdown as a component of the emission limitation. Specifically, 40 CFR 60.42Da(e)(2) explicitly requires post-May 3, 2011, affected sources to comply with specific work practice standards in part 63, subpart UUUUU. The numerical emission limitation and the work practice requirement together comprise a continuous emission limitation and there is no exemption for emissions during startup and shutdown. The fact that the EPA has established different requirements for different periods of operation does not constitute creation of an exemption. These emission limitations have numerical limitations that apply during most periods and specific technological control requirements or work practice requirements that apply during startup and shutdown, but all periods of operation are subject to controls and no periods of operation are exempt from regulation. States are similarly able to alter their regulations, in response to this SIP call, to provide for emission limitations with different types of controls applicable during different modes of source operation, so long as those controls apply at all times and no periods are exempt from controls. As explained in section VII.A of this document, the EPA interprets section 110(a)(2)(A) to permit SIP provisions that are composed of a combination of numerical limitations, specific technological control requirements and/or work practice requirements, so long as the resulting emission limitations are continuous, meet applicable stringency requirements (*e.g.*, are RACT for sources in nonattainment areas) and are legally and practically enforceable.

The EPA also notes that the provisions of 40 CFR 60.42Da(b)(1) do not provide an "exemption" from the opacity standard. That section merely provides that the affected sources do not need to meet the opacity standard of the NSPS (at any time), if they have installed a PM continuous emission monitoring system (PM CEMS) to measure PM emissions continuously instead of relying on periodic stack tests to assure compliance with the PM emission limitation. One reason for the imposition of opacity standards on sources is to provide an effective means of monitoring for purposes of assuring source compliance with PM emission limitations and proper operation of PM emission controls on a continuous basis. If a source is subject to a sufficiently stringent PM limitation and has opted to install, calibrate, maintain and operate a PM CEMS to measure PM emissions, then it is reasonable for the EPA to conclude that an opacity emission limitation is not needed for that particular source for those purposes.[148] The direct measurement of PM, in conjunction with an appropriately stringent PM emission limitation that

[146] *See* 40 CFR 60.48Da(a). For affected facilities for which construction, modification, or reconstruction commenced after May 3, 2011, the applicable SO_2 emissions limit under § 60.43Da, NO_X emissions limit under § 60.44Da, and NO_X plus CO emissions limit under § 60.45Da apply at all times.

[147] The EPA notes that the emission standards for SO_2 in 40 CFR 60.43Da and for NO_X in 40 CFR 60.44Da, applicable to sources on which construction, modification or reconstruction commenced after May 3, 2011, also apply continuously and contain no exemptions for emissions during SSM events.

[148] For example, for NSPS regulations under subparts D, Da, Db and Dc of 40 CFR part 60, the EPA has deemed 0.030 lb/MMBtu to be a sufficiently stringent PM limitation for certain sources operating PM CEMS to conclude that an opacity emission limitation is not needed, on the basis that the contribution of filterable PM to opacity at PM levels of 0.030 lb/MMBtu or less is generally negligible, and sources with mass limits at this level or less will operate with little or no visible emissions (*i.e.*, less than 5 percent opacity). *See* 74 FR 5072 at 5073 (January 28, 2009).

structure that governs SIPs under CAA section 110.

The commenters further contended that in the SIP context, the underlying air quality pollution control requirement for SIPs is to attain NAAQS and no specific level of stringency is required, unlike section 112, and Congress gave states broad discretion in the design of their SIPs. Commenters asserted that the *Sierra Club* decision held only that the general-duty requirement in the section 112 regulations did not meet the stringency requirements of CAA section 112 and that this holding does not apply in the SIP context because in the SIP context no specific level of stringency is required.

Commenters also asserted that a general-duty requirement is an appropriate alternative standard for SSM events in the SIP context because CAA sections 302(k) and 110(a)(2)(A) give states broad authority to develop the mix of controls necessary and appropriate to implement the NAAQS. Other commenters contended that the *Sierra Club* decision does not preclude states from constructing a compliance regime that uses multiple methods to limit emissions as long as the overall compliance regime to minimize emissions is enforceable.

Commenters also suggested that the decision in *Kamp* v. *Hernandez* relied upon in the *Sierra Club* case affirmed EPA's approval of a state emission limitation in a SIP that specifically allowed and even expected a certain number of annual exceedances of the emission limit.[151] Some commenters argued that the *Sierra Club* decision should not be read to impose a "continuous emissions limitation" requirement and that to the extent it does, it was incorrectly decided.

Response: The EPA disagrees that the court's decision in *Sierra Club* v. *Johnson* has no relevance to this action. Of course that decision specifically addressed the validity of exemptions for emissions during SSM events in the Agency's own regulations promulgated under section 112. Naturally, that decision turned, in part, on the specific provisions of section 112 and the specific arguments that each of the litigants raised in that case. However, the decision also turned in large part on the explicit statutory definition of the term "emission limitation" in section 302(k), which requires such limitations to be "continuous."

In that litigation, the EPA itself had argued that the exemptions from the otherwise applicable MACT standards during SSM events were consistent with CAA requirements because the MACT standards and the separate "general duty" requirements "together form an uninterrupted, *i.e.*, continuous" emission limitation, because either the numerical limitation or the general duty applied at all times.[152] The *Sierra Club* court rejected this argument, in part because the general duty that EPA required sources to meet during SSM events was not itself consistent with section 112(d) and the EPA did not purport to act under section 112(h). Thus, the EPA agrees that the court in *Sierra Club* explicitly found that the SSM exemption in EPA's NESHAP general provision rules violated the CAA because the general duty to minimize emissions was not a section 112(d)-compliant standard and had not been justified by the EPA as a 112(h)-compliant standard. The court reasoned that when sections 112 and 302(k) are read together, there must be a continuous section 112-compliant standard. It is important to note that if the otherwise applicable numerical MACT standards had themselves applied at all times consistent with section 302(k), then there would have been no question that they were in fact continuous.

The EPA has concluded that the reasoning of the *Sierra Club* decision is correct and further supports the Agency's interpretations of the CAA with respect to SIP provisions. As explained in the February 2013 proposal, the EPA's longstanding SSM guidance has interpreted the CAA to prohibit exemptions for emissions during SSM events since at least 1982. The EPA has long explained that exemptions for emissions during SSM events are not permissible in SIP provisions, because they interfere with attainment and maintenance of the NAAQS, protection of PSD increments and improvement of visibility, and because they are inconsistent with the enforcement structure of the CAA. The EPA also noted that the definition of emission limitation in section 302(k) was part of the basis for its interpretation concerning SIP provisions.[153] In the February 2013 proposal, the EPA explained that the *Sierra Club* court's emphasis on the definition of the term emission limitation in section 302(k) further bolsters the Agency's basis for interpreting the CAA to preclude such exemptions in SIP provisions. In other words, under the CAA and the court's decision, emission limitations in SIP provisions as well as in NSPS and NESHAP regulations must be continuous, although they can impose different levels or forms of control during different modes of source operation.

The EPA also disagrees with the argument that the *Sierra Club* decision does not apply because section 110, unlike section 112, does not impose any specific level of "stringency" for SIP provisions. In accordance with section 110(a)(1), states are required to have SIPs that provide for attainment, maintenance and enforcement of the NAAQS in general. Pursuant to section 110(a)(2), states are required to have SIP provisions that meet many specific procedural and substantive requirements, including but not limited to, the explicit requirements of section 110(a)(2)(A) for emission limitations necessary to meet other substantive CAA requirements. In addition, however, states must have SIP provisions that collectively meet a host of other statutory requirements that also impose more specific stringency requirements. Merely by way of example, section 110(a)(2)(I) requires states with nonattainment areas to have SIP provisions that collectively meet part D requirements.[154] In turn, the different subparts of part D applicable to each NAAQS impose many requirements that require emission limitations in SIPs that meet various levels of stringency. Again, merely by way of example, states with nonattainment areas for PM under part D subpart 4 must have SIPs that include emission limitations that meet either the RACM and RACT level of stringency (if the nonattainment area is classified Moderate) or meet the BACM and BACT level of stringency (if the area is classified Serious).[155] There are similar requirements for states to impose emission limitations that must meet various levels of stringency for each of the NAAQS. Likewise, states must impose SIP emission limitations that meet BART and reasonable progress levels of stringency for regional haze program purposes[156] and must ensure that emission limitations meet BACT or LAER levels of stringency for PSD or nonattainment NSR permitting program

[151] 752 F.2d 1444 (9th Cir. 1985).

[152] *See* 551 F.3d 1019, 1026 (D.C. Cir. 2008).

[153] *See* 1999 SSM Guidance at 2, footnote 1 (citing the section 302(k) definition of emission limitations and emission standards).

[154] Sections 171–193 of CAA title I comprise part D.

[155] *See* CAA section 172(c)(2) (generally applicable attainment plan requirements including RACM and RACT); CAA section 189(a)(1) (requirements for areas classified Moderate); section 189(b) (requirements for areas classified Serious).

[156] *See* CAA section 169A(b)(2)(A).

been no need for the Kushner letter to speak to this issue.[163]

e. Comments that the EPA's proposed action on the Petition is incorrect because the Agency's recent MATS rule and Area Source Boiler rule regulations contain exemptions for emissions during SSM events.

Comment: Many commenters asserted that the EPA's February 2013 proposed action to find SIP provisions with exemptions for emissions during SSM events to be substantially inadequate is arbitrary and capricious because recent Agency NESHAP regulations under section 112 contain similar exemptions. Commenters pointed to recently promulgated rules such as the MATS rule[164] and the Area Source Boiler rule[165] as examples of NESHAP regulations that they claim contain similar exemptions. According to commenters, the emission limitations in EPA's own MATS rule "allow excess emissions during SSM events," suggesting that the Agency created exemptions for such emissions.[166] Other commenters similarly argued that the EPA created emission limitations in the Area Source Boiler rule that do not apply "continuously" because the numerical limitations do not apply during startup and shutdown.[167] In short, these commenters argued that the EPA is being arbitrary and capricious because it is holding emission limitations in SIPs to a different and higher standard than emission limitations under its own NSPS and NESHAP regulations.

Response: The EPA disagrees with these commenters. The recent EPA rulemaking efforts that commenters claim are at odds with EPA's SIP call are completely consistent with the Agency's action today. First, as explained in the February 2013 proposal, the EPA has not taken the position that sources must be subject to SIP emission limitations that are set at the same numerical level at all times, or that are expressed as numerical limitations at all times. As the EPA stated, "[i]f justified, the state can develop special emission limitations or control measures that apply during startup or shutdown if the source cannot meet the otherwise applicable emission limitation in the SIP." [168] The EPA's 1999 SSM Guidance articulated that SIP provisions may include alternative emission limitations applicable during startup and shutdown as part of a continuously applicable emission limitation when properly developed and otherwise consistent with CAA requirements. Moreover, the EPA recommended specific criteria relevant to the creation of such alternative emission limitations. The EPA reiterated that guidance in the February 2013 proposal and is providing a clarified version of the guidance in this final action. This issue is addressed in more detail in section VII.B.2 of this document.

The EPA also disagrees with the assertion that it is holding state SIP provisions to a different standard than its own NSPS and NESHAP regulations. The EPA notes that SIP emission limitations and NSPS and NESHAP emission limitations are, of course, designed for different purposes (*e.g.,* to meet the NAAQS versus to reduce emissions of HAPs) and have to meet some different statutory requirements (*e.g.,* to be RACM versus be standards that are compliant with section 112). However, the EPA understands the commenters' claim to be more specifically that the Agency is applying a different interpretation of the term "emission limitation" and taking a different approach to the treatment of emissions during SSM events in its own regulations, even in recent regulations developed subsequent to the *Sierra Club* decision. The EPA believes that this argument reflects a misunderstanding of both the February 2013 proposal and what the Agency's own new regulations contain.

The MATS rule and the Area Source Boiler rule in fact illustrate how the EPA is creating emission limitations that apply continuously, with numerical limitations or combinations of numerical limitations and other specific technological control requirements or work practice requirements applicable during startup and shutdown, depending upon what is appropriate for the source category and the pollutants at issue. For example, in the MATS rule the EPA has promulgated regulations that impose emission limitations on various subcategories of sources to address HAP emissions. To do so, the EPA developed emission limitations to address the relevant pollutants using a combination of numerical emission limitations and work practices. The work practice requirements specifically apply to sources during startup and shutdown and are thus components of the continuously applicable emission limitations.[169]

Similarly, in the Area Source Boiler rule[170] the EPA has imposed emission limitations on affected sources for PM, mercury and CO. The specific emission limitations that apply vary depending upon the subcategory of boiler. The emission limitations include a combination of numerical emission limitations and work practice requirements that together apply during all modes of source operation. For some subcategories, the standards that apply during startup and shutdown differ from the standards that apply during other periods of operation. This illustrates what the EPA considers the correct approach to creating emission limitations: (i) The emission limitation contains no exemption for emissions during SSM events; (ii) the component of the emission limitation that applies during startup and shutdown is clearly stated and obviously is an emission limitation that applies to the source; (iii) the component of the emission limitation that applies during startup and shutdown meets the applicable stringency level for this type of emission limitation (in this case section 112); and (iv) the emission limitation contains requirements to make it legally and practically enforceable. In short, the Area Source Boiler rule established emission limitations that apply continuously, in accordance with the requirements of the CAA, and consistent with the court's decision in the *Sierra Club* decision. States with SIP provisions that are deficient because they contain automatic or discretionary exemptions for emissions during SSM events may wish to consider the Agency's own approach when they develop SIP revisions in response to this SIP call.

f. Comments that section 110(a)(2)(A) authorizes states to have SIP provisions with exemptions for emissions during SSM events because they are not "emission limitations" and are not

[163] *See, e.g.,* 1999 SSM Guidance, Attachment at 1 ("any provision that allows for an automatic exemption for excess emissions is prohibited").

[164] The mercury and air toxics standards (MATS) rule for power plants regulates emissions from new and existing coal- and oil-fired electric utility steam generating units (EGUs) under 40 CFR part 63, subpart UUUUU.

[165] The Area Source Boiler rule regulates industrial, commercial and institutional boilers at area sources under 40 CFR part 63, subpart JJJJJJ.

[166] *See* MATS rule, requirements during startup, shutdown and malfunction, 77 FR 9304 at 9370 (February 16, 2012).

[167] *See* Area Source Boiler rule, notice of final action on reconsideration, periods of startup and shutdown, 78 FR 7487 at 7496 (February 1, 2013).

[168] *See* February 2013 proposal, 78 FR 12459 at 12488 (February 22, 2013).

[169] The EPA took final action on a petition for reconsideration concerning the MATS rule and the Utility NSPS that made certain revisions related to the emission limitations and work practices applicable during startup and shutdown. Those revisions did not, however, alter the basic structure of the emission limitations as numerical limitations, or numerical limitations with work practice components during startup and shutdown, depending upon the source category and the pollutants at issue. *See* 79 FR 68777 (November 19, 2014).

[170] 78 FR 7487 (February 1, 2013).

interpretations of prior versions of the CAA as requiring all SIPs to include continuously applicable emission limitations and only requiring "other" additional controls "as may be necessary" to satisfy the NAAQS.[175] Additionally, this result is contrary to legislative history of the 1990 Clean Air Act Amendments, which indicates that in slightly revising this portion of section 110(a)(2)(A), Congress intended to merely "combine and streamline" previously existing SIP requirements into a single provision, not to vitiate statutory requirements concerning emission limitations.[176]

Finally, the EPA's interpretation of the requirements of section 110(a)(2) does not render the "other control" language in the statute superfluous as claimed by the commenters. In addition to emission limitations, the EPA interprets that section to allow other "control measures, means or techniques" as contemplated by the statute. For example, the EPA's regulations implementing SIP requirements explicitly enumerate nine separate types of measures that states may include in SIPs.[177] This list of nine different forms of potential SIP provisions to reduce emissions varies broadly, from measures that "impose emission charges or taxes or other economic incentives or disincentives" to "changes in schedules or methods of operation of commercial or industrial facilities" to "any transportation control measure including those transportation measures listed in section 108(f)." The EPA made clear that this list is not all-inclusive. In addition, the EPA has, when appropriate, approved SIP provisions that impose various forms of emissions controls that are not, by definition, emission limitations.[178] Thus, the commenters are in error in their belief that the EPA's reading of the statute to require that SIPs contain emission limitations that apply continuously ignores the other forms of potential measures that section 110(a)(2)(A) authorizes.

Section 110(a)(2) requires SIPs to include enforceable emission limitations and other controls "as necessary or appropriate to meet the applicable requirements" of the CAA. Regardless of whether commenters' semantic labeling arguments are valid in the abstract, they are not correct with respect to the fundamental CAA requirements for SIPs relating to continuous emission limitations. The automatic or discretionary exemptions for emissions during SSM events in the SIP provisions at issue in this SIP call authorize exemptions from statutorily required emission limitations. To the extent that such a SIP provision would functionally or legally exempt sources from regulation during SSM events, the SIP provision fails to be a continuously applicable enforceable emission limitation as required by the CAA. The fact that a SIP may also contain "other control[s]" as advocated by the commenters does not negate the statutory requirement that emission limitations must apply continuously.

g. Comments that the definition of "emission limitation" in section 302(k) does not require that all forms of emission limitations must apply continuously.

Comment: Section 110(a)(2)(A) requires that SIPs must contain emission limitations, and section 302(k) defines the term "emission limitation" to mean a limit on emissions from a source that applies continuously. A number of commenters disagreed that section 302(k) requires that *all* "emission limitations" have to be "continuous." The commenters argued that section 302(k) establishes two distinct categories of emission limitations: (1) Requirements that "limit[ ] the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction," and (2) requirements constituting a "design, equipment, work practice or operational standard promulgated under this chapter." These commenters claimed that only the first purported category is emission limitations that must be continuous and that the second purported category is emission limitations that do not need to apply continuously. Accordingly, these commenters asserted that SIP provisions that are rendered noncontinuous by inclusion of exemptions for emissions during SSM events are still legally valid "emission limitations" because they fall within the second category. Other commenters separately contended that under section 302(k), SIP provisions imposing requirements "relating to the operation or maintenance of sources" do not need to be continuous, unlike those imposing requirements that limit "the quantity, rate, or concentration of emissions or air pollutants."

Response: The EPA disagrees with the commenters' view that section 302(k) establishes two discrete categories of emission limitations, only one of which must reduce continuous emissions on a continuous basis. The EPA acknowledges that the text of section 302(k) is ambiguous with respect to this point, but the Agency does not agree with the commenters' interpretation of the statute. The statutory text of section 302(k) begins with a catch-all definition of the term "emission limitation" as "a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis . . . ."[179] The EPA believes that the rest of the first sentence in section 302(k), beginning with the word "including," is best read as a list of examples of types of measures that satisfy this general definition. In other words, the remainder of the sentence provide examples of types of SIP provisions that could be used to limit emissions on a continuous basis, including any design standard, equipment standard, work practice standard or operational standard promulgated under the CAA, as well as "any requirement relating to the operation or maintenance of a source to assure continuous emission reduction." However, each of these forms of emission limitation would be required to apply at all times, or be required to apply in combination at all times, in order to meet the fundamental requirement that the emission limitation serves to limit emissions from the affected sources continuously. Thus, the EPA interprets the term "emission limitation" to permit emission limitations that are composed of a combination of numerical limitations, technological control requirements and/or work practice requirements, so long as they are components of an emission limitation that applies continuously. This interpretation accords with

[175] *See, e.g., Kennecott Copper Corp.* v. *Train,* 526 F.2d 1149, 1153 (9th Cir. 1975). The current version of section 110(a)(2)(A) is admittedly worded differently than the 1970 version. However, for purposes of these commenters the critical distinction is not that Congress changed the location of the word "necessary" but rather that Congress changed the subject that "necessary" modifies—and thus the entire scope of 110(a)(2)(A)—from satisfying the NAAQS to meeting "applicable requirements" of the entire CAA.

[176] *See, e.g.,* S. Rept. 101–228, at 20 (noting that the structure of section 110(a)(2)(A) as it appears today reflects congressional intent to "combine and streamline" previously existing SIP requirements into a single provision).

[177] *See* 40 CFR 51.100(n).

[178] *See, e.g.,* 71 FR 7683 (February 14, 2006) (approving as BACM the use of "conservation management practices" to control fugitive dust emissions from agricultural sources, including techniques that limit emissions only during certain activities or times); 68 FR 56181 (September 30, 2003) (approving as BACM an "episodic wood burning curtailment" program that restricts the use of wood-burning stoves based on predicted particulate matter concentrations).

[179] CAA section 302(k).

emissions during SSM events in violation of statutory requirements.[190]

Commenters also cited *Essex Chemical Corp.* for the proposition that SSM exemptions are necessary to ensure that standards are reasonable. This court decision, however, also did not hold that emission limitations must provide exemptions or affirmative defenses for excess emissions during SSM events. To the contrary, the petitioners' complaint in *Essex Chemical Corp.* was that EPA had "fail[ed] to provide that *lesser standards, or* no standards at all, should apply when the stationary source is experiencing startup, shutdown, or mechanical malfunctions through no fault of the manufacturer." [191] It was these variant provisions that, in the court's opinion, "appear[ed] necessary" to ensure that the standards before it were reasonable.[192] Again, the EPA believes that emission limitations in SIP provisions may include alternative emission limitations that can provide those "lesser standards" that apply during startup and shutdown events consistent with the court's opinion but also ensure that emissions are continuously limited as required by the 1977 CAA Amendments defining "emission limitation."

As a legal matter, the court in *Essex Chemical* was reviewing a specific "never to be exceeded" standard for new and modified sources and addressed only whether the EPA's failure to provide some form of flexibility during SSM events was supported by the record; [193] the court was not interpreting whether the CAA inherently required such exemptions (rather than alternative limits) regardless of future developments in technology. Accordingly, the D.C. Circuit ultimately remanded the challenged standards to the EPA for reconsideration, not because SSM exemptions are mandatory but rather because of comments made by the EPA Acting Administrator and deficiencies identified in the administrative record with respect to "never to be exceeded" limits for those specific standards. In short, the *Essex Chemical* court did not hold that the CAA "requires" emission limitations to include exemptions for emissions during SSM events as suggested by commenters.

Furthermore, the EPA notes that the most salient legal holding of *Essex Chemical* with respect to achievability is not what the court said about the circumstances peculiar to the EPA's development of those specific standards but rather is the court's holding that standards of performance can be "achievable" even if there is no facility "currently in operation which can at all times and under all circumstances meet the standards . . . ." [194] Thus, the decision supports the EPA's conclusion that the CAA requires appropriately drawn emission limitations that apply on a continuous basis. As explained in section IV of this document, SIP provisions also cannot include the affirmative defenses advocated by commenters, because those are inconsistent with CAA provisions concerning the jurisdiction of the courts.

i. Comments that the EPA is requiring that all SIP emission limitations must be "numerical" at all times and set at the same numerical level at all times.

Comment: Many commenters on the February 2013 proposal evidently believed that the EPA was proposing an interpretation of the term "emission limitation" under section 302(k) that would requires all SIP provisions to impose numerical emission limits, and that such limits must be set at the same numerical level at all times. These commenters argued that numerical emission limitations are not required by the text of section 302(k). For example, commenters pointed to section 302(k)'s use of "work practice or operational standard[s]" as evidence that an emission limitation may be composed of more than merely numerical criteria. These commenters also reiterated their view that section 302(k) allows for or requires alternative limits during periods of SSM, including non-numerical alternative limits such as work practice or operational standards.

Response: At the outset, the EPA notes that it did not intend to imply that all emission limitations in SIP provisions must be expressed numerically, or that they must be set at the same numerical level for all modes of source operation. To the contrary, the EPA intended to indicate that states may elect to create emission limitations that include alternative emission limitations that apply during certain modes of source operation, such as startup and shutdown. This was the reason for inclusion of the recommended criteria for states to develop appropriate alternative emission limitations applicable during startup and shutdown in section VII.A of the February 2013 proposal. The EPA has provided similar recommended criteria in this final action (see section VII.B.2 of this document). The EPA agrees that neither section 110(a)(2)(A) nor section 302(k) inherently requires that SIP emission limitations must be expressed numerically. Furthermore, section 302(k) does not itself require imposition of numerical limitations or foreclose the use of higher numerical levels, specific technological controls or work practices during certain modes of operation.

Although some CAA programs may require or impose a presumption that emission limitations be expressed numerically, the text of section 110(a)(2)(A) and section 302(k) does not expressly state a preference for emission limitations that are in all cases numerical in form.[195] Rather, as many commenters pointed out, the critical aspect of an emission limitation in general is that it be a "requirement . . . which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis . . . ." [196] Accordingly, although other regulatory requirements may also apply, a non-numerical design standard, equipment standard, work practice standard or operational standard could theoretically meet the definition of "emission limitation" for purposes of section 302(k) if it continuously limited the quantity, rate or concentration of air pollutants.[197] By contrast, if a non-numerical requirement does not itself (or in combination with other components of the emission limitation) limit the quantity, rate or concentration of air pollutants on a continuous basis, then the non-numerical standard (or overarching requirement) does not meet the statutory definition of an emission limitation under section 302(k).

Finally, the EPA does not believe that section 110(a)(2)(A) or section 302(k) mandates that an emission limitation be composed of a single, uniformly applicable numerical emission limitation. As the EPA stated in the February 2013 proposal, "[i]f sources in fact cannot meet the otherwise applicable emission limitations during planned events such as startup and shutdown, then an air agency can develop specific alternative

[190] *Id.* (citing *International Harvester*, 478 F.2d 615, 641 (D.C. Cir. 1973)).

[191] *Essex Chem. Corp* v. *Ruckelshaus*, 486 F.2d at 433 (emphasis added).

[192] *See id.*

[193] *Id.* ("the record does not support the 'never to be exceeded' standard currently in force").

[194] *Essex Chem. Corp* v. *Ruckelshaus*, 486 F.2d 427, 433 (D.C. Cir. 1973).

[195] Numerical requirements or preferences for some emission limitations flow from substantive requirements of specific CAA programs, which are incorporated into section 110(a)(2)(A) by the requirement that SIPs "include enforceable emission limitations . . . as may be necessary or appropriate to meet the applicable requirements of" the CAA. CAA section 110(a)(2)(A).

[196] *See, e.g., id.*, section 112(h)(4).

[197] For example, emission limitations must meet the requirements of various substantive provisions of the CAA and must be legally and practically enforceable.

k. Comments that an emission limitation can be "continuous" even if it includes periods of exemptions from the emission limitation.

Comment: Commenters asserted that a requirement limiting emissions can be "continuous" even if a SIP provision includes periods of exemption from that limit. For example, some commenters contended that SSM exemptions only excuse compliance with emission limitations for a "short duration," or "brief" period of time, and that these purportedly ephemeral interruptions should not be viewed as rendering the requirement noncontinuous. Other commenters contended that the EPA misinterpreted portions of the D.C. Circuit's opinion in *Sierra Club* v. *Johnson*,[205] interpreting section 302(k). Specifically, this group of commenters claimed that because the holding of that case was based on a combined reading of sections 112 and 302(k), the court's interpretation of the word "continuous" in section 302(k) does not extend outside the context of section 112. This included one commenter who suggested, in a one-sentence footnote, that "[i]n the cooperative-federalism context"—presumably of section 110—"the standard of flexibility that Congress gave the States with respect to selecting the elements of their SIPs is not necessarily the same standard Congress set to govern EPA's responsibility to establish the NAAQS or section 112 standards." Still other commenters further argued that the EPA mischaracterized legislative history discussing "continuous" in section 302(k). According to these commenters, the context of legislative history on section 302(k) indicates that Congress did not intend for the word "continuous" to be given its plain meaning but rather intended to use "continuous" in relation only to specific types of intermittent controls.

Response: The EPA disagrees with these commenters. First, commenters' interpretation would contravene the plain meaning of "continuous." Section 302(k) defines "emission limitation" as a requirement that "limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis. . . ." [206] Although the word "continuous" is not separately defined in the Act, its plain and unambiguous meaning is "uninterrupted." [207] Accordingly, to the extent that a SIP provision provides for any period of time when a source is *not* subject to any requirement that limits emissions, the requirements limiting the source's emissions by definition cannot do so "on a continuous basis." Such a source would not be subject to an "emission limitation," as that term is defined under section 302(k). The same principle applies even for "brief" exemptions from limits on emissions, because such exemptions nevertheless render the emission limitation noncontinuous.

Second, the EPA disagrees with commenters' interpretation of the D.C. Circuit's opinion in *Sierra Club*. While the court's ultimate decision was based on "sections 112 and 302(k) . . . read together," [208] the court's analysis of what makes a standard "continuous" was based on section 302(k) alone.[209] Although the precise components of an emission limitation or standard may expand depending on which other provisions of the CAA are applicable, the bedrock definition for what it means to be an "emission limitation" under section 302(k) does not. Congress appeared to share the EPA's view that section 302(k) provides a bedrock definition of "emission limitation" applicable "to all emission limitations under the act, not just to limitations under sections 110, 111, or 112 of the act." [210] Accordingly, the D.C. Circuit's interpretation of section 302(k) applies equally in the context of SIP provisions developed by states as in the context of MACT standards developed by the EPA, even if additional requirements may be different.[211]

Finally, the EPA rejects commenters' contention that section 302(k)'s legislative history indicates that use of the word "continuous" in the definition of "emission limitation" was merely intended to prevent the use of intermittent controls or, even more narrowly, only dispersion techniques. While legislative history of the 1977 Amendments discusses at length the concerns associated with these types of controls, section 302(k) was not intended to merely prevent the narrow problem of intermittent controls. To the contrary, the House Report states that under section 302(k)'s definition of emission limitation, "intermittent or supplemental controls *or other temporary, periodic, or limited systems of control* would not be permitted as a final means of compliance." [212]

In explaining congressional intent behind adopting a statutory definition of "emission limitation," the House Report articulated a rationale broader than would apply if Congress had merely intended to prohibit the tall stacks and dispersion techniques that commenters claim were targeted: "Each source's prescribed emission limitation is the fundamental tool for assuring that ambient standards are attained and maintained. Without an enforceable emission limitation which will be *complied with at all times*, there can be no assurance that ambient standards will be attained and maintained." [213] By contrast, Congress criticized limitations structured in ways that could not "provide assurances that the emission limitation will be met at all times," or that would sometimes allow the "emission limitation [to] be exceeded, perhaps by a wide margin . . . ." [214] Such flaws "would defeat the remedy provision provided by section 304 of the act which allows citizens to assure compliance with emission limitations and other requirements of the act." [215] Exemptions for emissions during SSM events have the same effects.[216]

In adopting section 302(k)'s definition of "emission limitation," Congress did not merely intend to prohibit the use of intermittent controls as final compliance strategies—much less intermittent controls as narrowly defined by commenters to mean only dispersion techniques and certain "tall stacks." Rather, Congress intended to eliminate the fundamental problems

[205] 551 F.3d 1019 (D.C. Cir. 2008).

[206] CAA section 302(k).

[207] *See Webster's Third New International Dictionary* 493–94 (Phillip Babcock Gove ed., Merriam-Webster 1993) (defining "continuous").

[208] *Sierra Club*, 551 F.3d at 1027.

[209] *See id.* (quoting H.R. Rep. 95–294, at 92 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1077, 1170); *see also Kamp* v. *Hernandez*, 752 F.2d at 1453–54 (quoting the same and coming to the same conclusion).

[210] *See* H.R. 95–294, at 92 (1977); *see also* section 302 (stating that the definitions appearing therein apply "[w]hen used in this chapter").

[211] The fact that CAA section 110 incorporates principles of cooperative federalism does not inevitably mean that the definition of "emission limitation" under section 302(k) changes depending on whether it is applied in the context of section 110 versus section 112. Accordingly, in the context of judicial interpretation of a statute, the U.S. Supreme Court has held that judges cannot "give the same statutory text different meanings in different cases." *Clark* v. *Martinez*, 543 U.S. 371, 386 (2005). The EPA believes that the text and legislative history of section 302(k) evince congressional intent to consistently apply the definition of "emission limitation" under section 302(k) rather than to develop an inconsistent interpretation peculiar to section 110.

[212] H.R. 95–294, at 92 (emphasis added).

[213] *Id.* (emphasis added). The Senate Report expressed a similar sentiment. *See* S. Rep. No. 95–127, at 94–95 (1977) (explaining that the definition of "emission limitation" was intended "to clarify the committee's view that the only acceptable *basic strategy* [for emission limitations in SIPs] is one based on continuous emission control").

[214] *See* H.R. 95–294, at 92.

[215] *See id.*

[216] *See, e.g., NRDC* v. *EPA*, 749 F.3d 1055, 1064 (D.C. Cir. 2014) (holding that an affirmative defense for excess emissions during malfunctions contradicts the requirement that an emission limitation be "continuous").

fully consistent with the principles of cooperative federalism codified in the CAA. As courts have concluded, although Congress provided states with "considerable latitude in fashioning SIPs, the CAA 'nonetheless subjects the States to strict minimum compliance requirements' and gives EPA the authority to determine a state's compliance with the requirements." [222] This interpretation is also consistent with congressional intent that the EPA exercise supervisory responsibility to ensure that, *inter alia,* SIPs satisfy the broad requirements that section 110(a)(2) mandates that SIPs "shall" satisfy.[223] Where the EPA determines that a SIP provision does not satisfy legal requirements, the EPA is not substituting its judgment for that of the state but rather is determining whether the state's judgment falls within the wide boundaries of the CAA.

m. Comments that a "general duty" provision—or comparable generic provisions that require sources to "exercise good engineering judgment," to "minimize emissions" or to "not cause a violation of the NAAQS"—inoculate or make up for exemptions in specific emission limitations that apply to the source.

Comment: Numerous commenters argued that even if some of the SIP provisions with SSM exemptions identified in this SIP call are not themselves emission limitations, they are nevertheless *components* of valid emission limitations. According to these commenters, some SIPs contain separate "general duty" provisions that are not affected by SSM exemptions and thus have the effect of limiting emissions from sources during SSM events that are explicitly exempted from the emission limitations in the SIP. These general-duty provisions vary, but most of them: (1) Instruct sources to "minimize emissions" consistent with good air pollution control practices, (2) prohibit sources from emitting pollutants that cause a violation of the NAAQS, or (3) prohibit source operators from "improperly operating or maintaining" their facilities.

Commenters contended that these general-duty provisions are requirements that—either alone or in combination with other requirements—have the effect of limiting emissions on a continuous basis. In other words, the commenter asserted that these general-duty provisions impose limits on emissions during SSM events, when the otherwise applicable controls no longer apply. According to these commenters, SSM exemptions that excuse noncompliance with typical controls do not interrupt the continuous application of an "emission limitation," because these general-duty provisions elsewhere in the SIP or in a separate permit are part of the emission limitation and apply even during SSM events.

Some commenters further argued that some SSM exemptions themselves demonstrate that sources remain subject to general-duty provisions during SSM events. These SSM exemptions require sources seeking to qualify for the exemption to demonstrate that, *inter alia,* they were at the time complying with certain general duties. Accordingly, these commenters contended that the SSM exemption itself demonstrates that sources remain subject to requirements that limit their emissions during SSM events, even when the source is excused from complying with other components of the overarching emission limitation.

Finally, as evidence that these general-duty clauses must be permissible under the CAA, some commenters pointed to similar federal requirements established by the EPA under the NSPS and NESHAP programs.[224] These commenters argued that the D.C. Circuit's decision in *Sierra Club* v. *Johnson* [225] was limited to circumstances unique to section 112 and does not support a *per se* prohibition on general-duty clauses operating as "emission limitations."

Response: The EPA disagrees with these comments. As described elsewhere in this response to comments, all "emission limitations" must limit emissions of air pollutants on a continuous basis.[226] The specific requirements of a SIP emission limitation must be discernible on the face of the provision, must meet the applicable substantive and stringency requirements of the CAA and must be legally and practically enforceable. The general-duty clauses identified by these commenters are not part of the putative emission limitations contained in these SIP provisions. To the contrary, these general-duty clauses are often located in different parts of the SIP and are often not cross-referenced or otherwise identified as part of the putative continuously applicable emission limitation.

Furthermore, the fact that a SIP provision includes prerequisites to qualifying for an SSM exemption does not mean those prerequisites are themselves an "alternative emission limitation" applicable during SSM events. The text and context of the SIP provisions at issue in this SIP call action make clear that the conditions under which sources qualify for an SSM exemption are not themselves components of an overarching emission limitation—*i.e.,* a requirement that limits emissions of air pollutants from the affected source on a continuous basis. Rather, these provisions merely identify the circumstances when sources are exempt from emission limitations.

Reviewing an example of the SIP provisions cited by commenters is illustrative of this point. For example, several commenters pointed to provisions in Alabama's SIP that excuse a source from complying with an otherwise applicable emission limitation only when the permittee "took all reasonable steps to minimize emissions" and the "permitted facility was at the time being properly operated." According to commenters, the general duties in this provision—to take reasonable steps to minimize emissions, and to properly operate the facility—ensure that even during SSM events, the permittee remains subject to requirements limiting emissions.

However, a review of the provisions themselves in context—not selectively quoted—reveals that these general-duty provisions were included in the SIP not as components of an emission limitation but rather as components of an *exception* to that emission limitation. In order to qualify, the SIP requires the permittee to have taken "all reasonable steps to minimize levels of emissions *that exceeded the emission standard*" [227]—an acknowledgement that the emissions to be "minimize[d]" are those that "exceed[]" (*i.e.,* go beyond) the required limits of "the emission standard." In case there were any doubt that the general-duty provisions identified are elements of an exemption from an emission limitation, rather than components of the emission limitation itself, the provisions apply during what the Alabama SIP calls "[e]xceedances of *emission limitations*" [228] and are found within a

[222] *Michigan* v. *EPA,* 213 F.3d 663, 687 (D.C. Cir. 2000) (quoting *Union Elec. Co.* v. *EPA,* 427 U.S. 246, 256–57 (1976)).

[223] With respect to section 110(a)(2)(A), this means that a SIP must at least contain legitimate, enforceable emission limitations to the extent they are necessary or appropriate "to meet the applicable requirements" of the Act. Likewise, SIPs cannot have enforcement discretion provisions or affirmative defense provisions that contravene the fundamental requirements concerning the enforcement of SIP provisions.

[224] *See, e.g.,* 40 CFR 63.6(e)(3).

[225] 551 F.3d 1019, 1027–28 (D.C. Cir. 2008).

[226] CAA section 302(k).

[227] Ala. Admin. Code Rule 335–3–14–.03(h)(2)(ii)(III) (emphasis added).

[228] *Id.* at 335–3–14–.03(h)(2)(ii) (emphasis added).

defense might also be an appropriate tool for addressing excess emissions in a SIP provision. However, in response to recent court decisions, and as discussed in detail in section IV of this document, the EPA no longer interprets the CAA to permit affirmative defense provisions in SIPs.

Although the EPA did not expressly rely on the definition of "emission limitation" in section 302(k) as the basis for its SSM Policy in each of these guidance documents, it did rely on the purpose of the NAAQS program and the underlying statutory provisions (including section 110) governing that program. In the 1999 SSM Guidance, however, the EPA indicated that the definition of emission limitation in section 302(k) was part of the basis for its position concerning SIP provisions.[234] After the EPA issued the 1999 SSM Guidance, the D.C. Circuit issued a decision holding that the definition of emission limitation in section 302(k) does not allow for periods when sources are not subject to emissions standards.[235] While the court's decision concerned the section 112 program addressing hazardous air pollutants, the EPA believes that the court's ruling concerning section 302(k) applies equally in the context of SIP provisions because the definition of emission limitation also applies to SIP requirements. That court's decision is consistent with and provides support for the EPA's longstanding position in the SSM Policy that exemptions from compliance with SIP emission limitations are not appropriate under the CAA.

Commenters claimed that by interpreting the CAA to prohibit exemptions for emissions during SSM events the EPA is revoking "enforcement discretion" exercised by the state. This is not true. As part of state programs governing enforcement, states can include regulatory provisions or may adopt policies setting forth criteria for how they plan to exercise their own enforcement authority. Under section 110(a)(2), states must have adequate authority to enforce provisions adopted into the SIP, but states can establish criteria for how they plan to exercise that authority. Such enforcement discretion provisions cannot, however, impinge upon the enforcement authority of the EPA or of others pursuant to the citizen suit provision of the CAA. The EPA notes that the requirement for adequate enforcement authority to enforce CAA requirements is likewise a bar to automatic exemptions from compliance during SSM events.

Commenters confused the EPA's evolution in describing the basis for its longstanding SSM Policy as a change in the SSM Policy itself. The EPA's interpretation of the CAA in the SSM Policy has not changed with respect to exemptions for emissions during SSM events. The EPA's discussion of the basis for its longstanding interpretation has evolved and become more robust over time as the EPA has responded to comments in rulemakings and in response to court decisions. In support of its interpretation of the CAA that exemptions for periods of SSM are not acceptable in SIPs, the EPA has long relied on its view that NAAQS are health-based standards and that exemptions undermine the ability of SIPs to attain and maintain the NAAQS, to protect PSD increments, to improve visibility and to meet other CAA requirements. By contrast, the EPA historically took the position that SSM exemptions were acceptable for certain technology-based standards, such as NSPS and NESHAP standards, and argued that position in the *Sierra Club* case cited by commenters. However, in that case, the court explicitly ruled against the EPA's interpretation, holding that exemptions for emissions during SSM events are precluded by the definition of "emission limitation" in CAA section 302(k). The *Sierra Club* court's rationale thus provided additional support for the EPA's longstanding position with respect to SSM exemptions in SIP provisions, and in more recent actions the EPA has relied on the reasoning from the court's decision as further support for its current SSM Policy. Thus, even if the EPA were proceeding under a "change of policy" here as the commenters claimed, the EPA has adequately explained the basis for its current SSM Policy, including the basis for any actual "change" in that guidance (*e.g.*, the actual change in the SSM Policy with respect to affirmative defense provisions in SIPs). Courts have upheld an agency's authority to revise its interpretation of a statute, so long as that change of interpretation is explained.[236]

o. Comments that the EPA's proposed action on the petition is based on a "changed interpretation" of the definition of "emission limitation."

Comment: Commenters claimed that the EPA's action on the Petition is based on a changed interpretation of the term "emission limitation" and that the Agency cannot apply that changed interpretation "retroactively." One commenter cited several cases for the proposition that retroactivity is disfavored and that the EPA is applying this new interpretation retroactively to existing SIP provisions. The commenter claimed that the EPA approved the existing SIP provisions with full knowledge of what those provisions were and "consistent with the provisions EPA itself adopted and courts required." The commenter characterized the SIP provisions for which the EPA is issuing a SIP call as "enforcement discretion" provisions and "affirmative defense" provisions for startup and shutdown. The commenter contended that the EPA does not have authority to issue a SIP call on the premise that the CAA is less flexible than the Agency previously thought. The commenter concluded that "[t]he factors of repose, reasonable reliance, and settled expectations favor not imposing EPA's new interpretations."

Response: The EPA disagrees that this SIP call action has "retroactive" effect. As recognized by the commenter, this SIP call action does not automatically change the terms of the existing SIP or of any existing SIP provision, nor does it mean that affected sources could be held liable in an enforcement case for past emissions that occurred when the deficient SIP provisions still applied. Rather, the EPA is exercising its clear statutory authority to call for the affected states to revise specific deficient SIP provisions so that the SIP provisions will comply with the requirements of the CAA prospectively and so that affected sources will be required to comply with the revised SIP provisions prospectively.

To the extent that a SIP provision complied with previous EPA interpretations of the CAA that the Agency has since determined are flawed, or to the extent that the EPA erroneously approved a SIP provision that was inconsistent with the terms of the CAA, the EPA disagrees that it is precluded from requiring the state to modify its SIP now so that it is consistent with the Act. In fact, that is precisely the type of situation that the SIP call provision of the CAA is designed to address. Specifically, section 110(k)(5) begins, "[w]henever" the EPA determines that an applicable implementation plan is inadequate to attain or maintain the NAAQS, to mitigate adequately interstate pollutant transport, or "to otherwise comply with

[234] *See* 1999 SSM Guidance at 2, footnote 1. The EPA included section 302(k) among the statutory provisions that formed the basis for its interpretations of the CAA in that document.

[235] *Sierra Club*, 551 F.3d 1019 (D.C. Cir. 2008).

[236] The EPA emphasized this important point in the SNPR. *See* 79 FR 55919 at 55931.

CAA requirements. If a state determines that it is reasonable to require a source to meet a specific emission limitation on a continuous basis and also decides to rely on its own enforcement discretion to determine whether a violation of that emission limit should be subject to enforcement, then the EPA believes that to do so is within the discretion of the state.

q. Comments that the EPA's action on the Petition is inconsistent with the Credible Evidence Rule.

Comment: A number of commenters raised concerns based upon how the EPA's statements in the February 2013 proposal relate to the Credible Evidence Rule issued in 1997.[241] For example, one commenter argued that throughout the February 2013 proposal, when the EPA stated that excess emissions during SSM events should be treated as "violations" of the applicable SIP emission limitations, the Agency was contradicting the Credible Evidence Rule and other provisions of law. The commenter emphasized that the determination of whether excess emissions during an SSM event are in fact a "violation" of the applicable SIP provisions must be made using the appropriate reference test method. In addition, the commenter asserted that whether any other form of information may be used as "credible evidence" of a violation must be evaluated by the trier of fact in a specific enforcement action. Another commenter raised a different argument based on the Credible Evidence Rule, claiming that the EPA's statements in the preamble to that rulemaking contradict the EPA's statements in the February 2013 proposal and support the need for exemptions for emissions during SSM events. The implication of the commenter is that any such EPA statements in connection with the Credible Evidence Rule would negate the Agency's interpretation of the statutory requirements for SIP provisions as interpreted in the SSM Policy since at least 1982, the decision of the court in the *Sierra Club* case or any other actions such as the recent issuance of EPA regulations with no such SSM exemptions.

Response: The EPA agrees, in part, with the commenters who expressed concern that the Agency's statements in the February 2013 proposal could be misconstrued as a definitive determination that the excess emissions during any and all SSM events are automatically a violation of the applicable emission limitation, without factual proof of that violation, and without the existence and scope of that violation being decided by the appropriate trier of fact. The EPA agrees that the alleged violation of the applicable SIP emission limitation, if not conceded by the source, must be established by the party bearing the burden of proof in a legal proceeding. The degree to which evidence of an alleged violation may derive from a specific reference method or any other credible evidence must be determined based upon the facts and circumstances of the exceedance of the emission limitations at issue.[242] This is a basic principle of enforcement actions under the CAA, but the EPA wishes to make this point clearly in this final action to avoid any unintended confusion between the legal standard creating the enforceable obligation and the evidentiary standard for proving a violation of that obligation.

The EPA's general statements in the February 2013 proposal, the SNPR and this final action about treatment of SSM emissions as a violation pertain to another basic principle, *i.e.,* that SIP provisions cannot treat emissions during SSM events as exempt, because this is inconsistent with CAA requirements. Thus, when the EPA explains that these emissions must be treated as "violations" in SIP provisions, this is meant in the sense that states with SSM exemptions need to remove them, replace them with alternative emission limitations that apply during startup and shutdown or eliminate them by revising the emission limitation as a whole. Once impermissible SSM exemptions are removed from the SIP, then any excess emissions during such events may be the subject of an enforcement action, in which the parties may use any appropriate evidence to prove or disprove the existence and scope of the alleged violation and the appropriate remedy for an established violation. To be clear, the fact that these emissions are currently exempt through inappropriate SIP provisions is a deficiency that the EPA is addressing in this action. Thus, the EPA disagrees with the commenters' suggestion that these emissions are never to be treated as violations simply because a deficient SIP provision currently includes an SSM exemption. Once the SIP provisions are corrected, the excess emissions may be addressed through the legal structure for establishing an enforceable violation, which then may be proven using appropriate evidence, including test method evidence or other credible evidence. This means that excess emissions that occur during an SSM event will be treated for enforcement purposes in exactly the same manner as excess emissions that occur outside of SSM events. The EPA acknowledges that the limitation that applies during a startup or shutdown event might ultimately be different (whether higher or lower) than the limitation that applies at other times, if the state elects to replace the SSM exemption with an appropriate alternative emission limitation in response to this SIP call action.

The EPA also disagrees with commenters who claimed that statements by the Agency in the Credible Evidence Rule final rule preamble support the inclusion of exemptions for SSM events in SIP provisions. The commenter is correct that at that time, the EPA held the view that emission limitations in its own NSPS could be considered "continuous," notwithstanding the fact that they contained "specifically excused periods of noncompliance" (*i.e.,* exemptions from emission limitations during SSM events).[243] Similarly, at that time the EPA relied on a number of reported court decisions discussed in the preamble for the Credible Evidence Rule for determining at that time that NSPS could contain such exemptions in order to make the emission limitations "reasonable." However, after the court's decision in the *Sierra Club* case interpreting the definition of emission limitation in section 302(k), these EPA statements in the preamble for the Credible Evidence Rule are no longer correct and thus do not apply to the EPA's action in this document.

First, the EPA notes that these prior statements related to the Credible Evidence Rule specifically addressed not SIP provisions but rather the provisions of the Agency's own technologically based NSPS. The statements in the document make no reference to SIP provisions, which is unsurprising given that EPA's SSM Policy at the time indicated that no such SSM exemptions are appropriate in SIP provisions. Second, the EPA's justification for exemptions from emission limitations during SSM events in NSPS was made prior to the 2008

[241] *See* "Credible Evidence Revisions; Final rule," 62 FR 8314 (February 24, 1997).

[242] For example, the degree to which data from continuous opacity monitoring systems (COMS) is evidence of violations of SIP opacity or PM mass emission limitations is a factual question that must be resolved on the facts and circumstances in the context of an enforcement action. *See, e.g., Sierra Club* v. *Pub. Ser* v. *Co. of Colorado, Inc.,* 894 F.Supp. 1455 (D. Colo. 1995) (allowing use of COMS data to prove opacity limit violations).

[243] *Id.,* 62 FR 8314, 8323–24.

emissions from a source. Even in those instances where a precise correlation is not available, however, the use of opacity as a means to assure the reduction of PM emissions and to monitor source compliance remains a valid approach to regulation of PM from sources. In any event, the absence of a precise correlation between opacity and PM does not justify the complete exemptions from SIP opacity limitations during SSM events that the commenters advocate and instead suggests that it may be appropriate to replace such exemptions with valid and enforceable alternative numerical limitations or other control requirements as a component of the SIP opacity emission limitation that applies during startup and shutdown. Opacity emission limitations in SIPs must meet the statutory requirements for emission limitations.

Fourth, the EPA agrees with commenters that for some sources some PM controls cannot operate, or operate at full effectiveness and ideal efficiency, during startup and shutdown. Accordingly, as the commenters implicitly recognized, the resulting increases in PM emissions can result in elevated opacity and thus exceedances of the applicable SIP opacity emission limitations. In those situations where it is true that no additional emissions controls are available or would function more effectively to reduce PM emissions, and hence to reduce opacity, it may be appropriate for states to consider imposing an alternative opacity emission limitation applicable during startup and shutdown. As discussed in section VII.B.2 of this document, the EPA provides recommendations to states concerning how to develop such alternative emission limitations. To the extent that sources believe that a SIP provision with a higher opacity level for startup and shutdown may be justified, they may seek these alternative limitations from the state and they can presumably advocate for opacity standards that are tailored to reflect the correlation between PM mass and opacity at a specific source. Significantly, however, even if it is appropriate to impose a somewhat higher opacity limitation for some sources during specifically defined modes of operation such as startup and shutdown, that does not justify the total exemptions from SIP opacity emission limitations during SSM events that the commenters advocated. To provide total exemptions from SIP opacity emission limitations during SSM events does not provide any incentive for sources to be better designed, operated, maintained and controlled to reduce emissions, nor does it comply with the most basic requirement that SIP emission limitations be continuous in accordance with section 302(k). As explained in section X.B of this document, the SIP revisions in response to this SIP call action will need to be consistent with the requirements of sections 110(k)(3), 110(l) and 193 as well as any other applicable requirements.

Fifth, the EPA notes that few commenters seriously argued that SIP provisions for opacity do not fit within the plain language of section 110(a)(2)(A) or the definition of "emission limitation" in section 302(k) or in EPA regulations applicable to SIP provisions. Section 110(a)(2)(A) requires SIPs to contain such enforceable emission limitations "as may be necessary and appropriate to meet the applicable requirements of" the CAA. Opacity limitations in SIP provisions are necessary and appropriate for a variety of reasons already described, including as a means to reduce PM emissions, as a means to monitor source compliance and to provide for more effective enforcement. Opacity limitations in SIP provisions also easily fit within the concept of a limit on the "quantity, rate or concentration of air pollutants" that relates to the "operation or maintenance of a source to assure continuous emission reduction and any design, equipment, work practice or operational standard" under the CAA, as provided in section 302(k). The term "air pollutant" is defined broadly in section 302(g) to mean "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air." Even if opacity is not itself an air pollutant, it is clearly a means of monitoring and limiting emissions of PM from sources and is thus encompassed within the definition of "emission limitation" in section 302(k).[247] Significantly, existing EPA regulations applicable to SIP provisions already explicitly define the term "emission limitation" to include opacity limitations.[248]

Finally, the EPA does not agree with commenters who argued that because SIP opacity limitations were often originally imposed when the PM NAAQS was for TSP, it is legally acceptable to have exemptions for emissions during SSM events now that the PM NAAQS use PM_{10} and $PM_{2.5}$ as the indicator species. On a factual level, it is obvious that SIP provisions for opacity limitations are expressed in terms of percentage "opacity" unrelated to the size of the particles. Opacity represents the degree to which emissions reduce the transmission of light and obscures the view of an object in the background. In general, the more particles which scatter or absorb light that passes through an emissions point, the more light will be blocked, thus increasing the opacity percentage of the emissions plume. The EPA agrees that variables such as the size, number and composition of the particles in the emissions can result in variations in the percentage of opacity. Notwithstanding the changes in the NAAQS, however, both states and the EPA have continued to rely on opacity limitations because they serve the same purposes for the current PM_{10} and $PM_{2.5}$ NAAQS (and other purposes such as the regulation of HAPs under section 112) that they previously did for the TSP NAAQS. Indeed, as the PM NAAQS have been revised to provide better protection of public health, the need for such opacity limitations continues unless there is a better means to monitor source compliance, such as PM CEMS. As with other SIP emission limitations, the EPA interprets the CAA to preclude SSM exemptions in opacity standards.

s. Comments that exemptions from SIP opacity limitations for excess emissions during SSM events should be allowed because such emissions are difficult to monitor or to control.

Comment: Several commenters argued that the EPA's proposal of a SIP call for SIP opacity emission limitations that include an SSM exemption is arbitrary and capricious because it is difficult or impossible to monitor or measure opacity during SSM events. According to commenters, there is no compliance methodology to determine whether opacity limitations are met during SSM events and this is the reason that the EPA's own general provisions for NSPS and NESHAP exclude emissions during SSM events as "not representative" of source operation. In the absence of a specific methodology to demonstrate compliance, the commenters argued that expecting sources to comply with any opacity emission limitations during SSM events is arbitrary and capricious. The commenters asserted that in light of this, the EPA must interpret the CAA to allow exemptions for SSM events in SIP opacity provisions.

A number of commenters also argued that because emission controls for PM do not function, or do not function as effectively or efficiently, during certain

[247] *See Sierra Club* v. *TVA*, 430 F.3d 1337, 1340 (11th Cir. 2005).

[248] *See* 40 CFR 51.100(z).

needed to monitor source compliance with SIP emission limitations and provide incentives to avoid and promptly correct malfunctions; *i.e.*, it would be illogical to require no legal restriction on emissions when the sources are most likely to be emitting the most air pollutants. Inclusion of exemptions for exceedances of SIP opacity limitations during such periods would remove incentives to design, maintain and operate the source correctly, and to promptly correct malfunctions, in order to assure that it meets the applicable SIP emission limitations. By exempting excess emissions during such events, the provision would undermine the enforcement structure of the CAA in section 113 and section 304, through which the air agency, the EPA and citizens are authorized to assure that sources meet their obligations. The EPA emphasizes that while exemptions from SIP limitations are not permissible in SIP provisions, states may elect to impose appropriate alternative emission limitations. They may include alternative numerical limitations, control technologies or work practices that apply during modes of operation such as startup and shutdown, so long as all components of the SIP emission limitation meet all applicable CAA requirements.

t. Comments that exemptions in SIP opacity limitations should be permissible for "maintenance," "soot-blowing" or other normal modes of source operation.

Comment: A number of industry commenters argued that the EPA should interpret the CAA to allow exemptions from SIP opacity limitations for "maintenance." The commenters stated that during maintenance, sources must shut down operations and control devices while the source is cleaned or repaired. During such periods, the commenters explained, a ventilation system operated to protect workers at the source could result in monitored exceedances of a SIP opacity limitation. Commenters specifically argued that although COMS data may suggest violations of opacity standards during such periods, the fact that the source is not combusting fuel during maintenance should mean that the opacity emission limitation does not apply at such times. According to commenters, opacity limitations are only intended to reflect the performance of pollution control equipment while the source is operating and thus have no relevance during periods of maintenance. Other commenters made comparable arguments with respect to soot-blowing, asserting that the high opacity levels during this activity are "indicative of normal ESP operation, not poor performance." In other words, the commenters argued that opacity limitations should contain complete exemptions for opacity emitted during soot-blowing on the theory that the elevated emissions during this mode of operation show that the control measure on a source is functioning properly. The commenters further argued that considering emissions during soot-blowing for purposes of PM limitations is appropriate, but not for purposes of opacity limitations, because of the way in which regulators developed the respective emission limitations.

Response: The EPA does not agree that exemptions from SIP opacity limitations are appropriate for any mode of source operation, whether during SSM events or during other normal, predictable modes of source operation. To the extent that there are legitimate technological reasons why sources are able to meet only a higher opacity limitation during certain modes of operation, it does not follow that this constraint justifies complete exemption from any standard or any alternative technological control or work practice in order to reduce opacity during such periods. Providing a complete exemption for opacity during these modes of source operation, and no specific alternative emission limitation during such periods, removes incentives for sources to be properly designed, maintained and operated to reduce emissions during such periods.

With respect to maintenance, the EPA does not agree with commenters that total exemptions from opacity emission limitations during such activities are consistent with CAA requirements for SIP provisions. As the EPA has stated repeatedly in its interpretation of the CAA in the SSM Policy, maintenance activities are predictable and planned activities during which sources should be expected to comply with applicable emission limitations.[250] The premise of the commenters advocating for such exemptions for all emissions during maintenance is evidently that nothing can be done to limit PM emissions and thus limit opacity during maintenance activities, and the EPA disagrees with that general premise. To the extent appropriate, however, states may elect to create alternative emission limitations applicable to opacity during maintenance periods, so long as they are consistent with CAA requirements. The EPA provides recommendations for alternative emission limitations in section VII.B.2 of this document.

With respect to soot-blowing, the EPA likewise does not agree that total exemptions from opacity limitations during such periods are consistent with CAA requirements. As with maintenance in general, soot-blowing is an intentional, predictable event within the control of the source. The commenters' implication is that nothing whatsoever could be done to limit opacity during such activities, and the EPA believes that this is both inaccurate and not a justification for sources' being subject to no standards whatsoever during soot-blowing. In addition, the EPA disagrees with the commenters' claim that exemptions from opacity emission limitations during soot-blowing are legally permissible because this allegedly shows that the control devices for opacity and PM are in fact performing correctly. This argument incorrectly presupposes that the sole reason for SIP opacity emission limitations is as a means of better evaluating control measure performance. This is but one reason for SIP opacity limitations. Moreover, the EPA notes, excusing opacity during soot-blowing has the diametrically opposite effect of the actual purpose of the control devices and can result in much higher emissions as opposed to encouraging limiting these emission with other forms of controls.

Finally, the EPA notes, the commenters' argument that whether opacity limitations should apply during soot-blowing depends upon whether the emissions were or were not accounted for in the applicable PM emissions is also based upon an incorrect premise. Even if the PM emission limitation applicable to a source was developed to include the emissions during soot-blowing specifically, it does not follow that sources should be completely exempted from opacity limitations during such periods. As the commenters themselves frequently acknowledged, when compared to other enforcement tools, SIP opacity provisions often provide a much more effective and continuous means of determining source compliance with SIP PM limitations and control measure performance. A typical SIP opacity provision imposes an emission limitation such as 20 percent opacity at all times, except for 6 minutes per hour when those emissions may rise to 40 percent opacity. Well-maintained and

[250] *See* 1982 SSM Guidance at Attachment p. 2; 1983 SSM Guidance at Attachment p. 3. The EPA notes that it also did not interpret the CAA to permit affirmative defense provisions for planned events under its prior 1999 SSM Guidance on the grounds that sources should be expected to operate in accordance with applicable SIP emission limitations during maintenance. This interpretation was upheld in *Luminant Generation* v. *EPA*, 714 F.3d 841 (5th Cir. 2013).

or work practice requirements, with each component of the emission limitation applicable during a defined mode of source operation. Regardless of how an air agency elects to express the emission limitation, however, the emission limitation must limit emissions from the affected sources on a continuous basis. Thus, if there are different numerical limitations or other control requirements that apply during startup and shutdown, those must be clearly stated components of the emission limitation, must meet the applicable level of control required for the type of SIP provision (*e.g.*, be RACT for sources located in nonattainment areas) and must be legally and practicably enforceable.

2. What Is Being Finalized in This Action

The EPA is reiterating its interpretation of the CAA to allow SIP emission limitations to include components that apply during specific modes of source operation, such as startup and shutdown, so long as those components together create a continuously applicable emission limitation that meets the relevant substantive requirements and requisite level of stringency for the type of SIP provision at issue and is legally and practically enforceable. In addition, the EPA is updating the specific recommendations to states for developing such alternative emission limitations described in the February 2013 proposal, by providing in this document some additional explanation and revisions to the text of its recommended criteria regarding alternative emission limitations.

The EPA's longstanding position is that the CAA does not allow SIP provisions that include exemptions from emission limitations for excess emissions that occur during startup and shutdown. The EPA reiterates that exemptions from SIP emission limitations are also not permissible for excess emissions that occur during other periods of normal source operation. A number of SIP provisions identified in the Petition create automatic or discretionary exemptions from otherwise applicable emission limitations during periods such as "maintenance," "load change," "soot-blowing," "on-line operating changes" or other similar normal modes of operation. Like startup and shutdown, the EPA considers all of these to be modes of normal operation at a source, for which the source can be designed, operated and maintained in order to meet the applicable emission limitations and during which the source should be expected to control and minimize emissions. Accordingly, exemptions for emissions during these periods of normal source operation are not consistent with CAA requirements. Excess emissions that occur during planned and predicted periods should be treated as violations of any applicable emission limitations.

However, the EPA interprets the CAA to allow SIPs to include alternative emission limitations for modes of operation during which an otherwise applicable emission limitation cannot be met, such as may be the case during startup or shutdown. The alternative emission limitation, whether a numerical limitation, technological control requirement or work practice requirement, would apply during a specific mode of operation as a component of the continuously applicable emission limitation. For example, an air agency might elect to create an emission limitation with different levels of control applicable during specifically defined periods of startup and shutdown than during other normal modes of operation. All components of the resulting emission limitation must meet the substantive requirements applicable to the type of SIP provision at issue, must meet the applicable level of stringency for that type of emission limitation and must be legally and practically enforceable. The EPA will evaluate a SIP submission that establishes a SIP emission limitation that includes alternative emission limitations applicable to sources during startup and shutdown consistent with its authority and responsibility pursuant to sections 110(k)(3), 110(l) and 193 and any other CAA provision substantively germane to the SIP revision. Absent a properly established alternative emission limitation for these modes of operation, a source should be required to comply with the otherwise applicable emission limitation.

In addition, the EPA is providing in this document some additional explanation and clarifications to its recommended criteria for developing alternative emission limitations applicable during startup and shutdown. The EPA continues to recommend that, in order to be approvable (*i.e.*, meet CAA requirements), alternative requirements applicable to the source during startup and shutdown should be narrowly tailored and take into account considerations such as the technological limitations of the specific source category and the control technology that is feasible during startup and shutdown. Accordingly, the EPA continues to recommend the seven specific criteria enumerated in section III.A of the Attachment to the 1999 SSM Guidance as appropriate considerations for SIP provisions that establish alternative emission limitations that apply to startup and shutdown. The EPA repeated those criteria in the February 2013 proposal as guidance to states for developing components of emission limitations that apply to sources during startup, shutdown or other specific modes of source operation to meet CAA requirements for SIP provisions.

Comments received on the February 2013 proposal suggested that the purpose of the recommended criteria may have been misunderstood by some commenters. The criteria were phrased in such a way that commenters may have misinterpreted them to be criteria to be applied by a state retrospectively (*i.e.*, after the fact) to an individual instance of emissions from a source during an SSM period, in order to establish whether the source had exceeded the applicable emission limitation. This was not the intended purpose of the recommended criteria at the time of the 1999 SSM Guidance, nor is it the intended purpose now.

The EPA seeks to make clear in this document that the recommended criteria are intended as guidance to states developing SIP provisions that include emission limitations with alternative emission limitations applicable to specifically defined modes of source operation such as startup and shutdown. A state may choose to consider these criteria in developing such a SIP provision. The EPA will use these criteria when evaluating whether a particular alternative emission limitation component of an emission limitation meets CAA requirements for SIP provisions. Any SIP revision establishing an alternative emission limitation that applies during startup and shutdown would be subject to the same procedural and substantive review requirements as any other SIP submission.

Based on comment on the February 2013 proposal, the EPA is updating the criteria to make clear that they are recommendations relevant for development of appropriate alternative emission limitations in SIP provisions. Thus, in this document, the EPA is providing a restatement of its recommended criteria that reflects clarifying but not substantive changes to the text of those criteria. One clarifying change is removal of the word "must" from the criteria, to better convey that these are recommendations to states concerning how to develop an approvable SIP provision with alternative requirements applicable to

limitation.[252] In these cases the state should consider how the control equipment works in determining what standards should apply during startup and shutdown. In addition, as noted by commenters, such standards may vary based on location (*e.g.*, standards in a hot and humid area may differ from those adopted for a cool and dry area). Some equipment during startup and shutdown may be unable to meet the same emission limitation that applies during steady-state operations and so alternative limitations for startup and shutdown may be appropriate.[253] However, for many sources, it should be feasible to meet the same emission limitation that applies during steady-state operations also during startup and shutdown.[254] These are issues for the state to consider in developing specific regulations as they revise the deficient SIP provisions identified in this action. The EPA emphasizes that the state has discretion to determine the best means by which to revise a deficient provision to eliminate an automatic or discretionary SSM exemption, so long as that revision is consistent with CAA requirements. The EPA will work with the states as they consider possible revisions to deficient provisions.

The EPA recognizes that a malfunction may cause a source to shut down in a manner different than in a planned shutdown, and in that case, such a shutdown would typically be considered part of the malfunction event. However, as part of the normal operation of a facility, sources typically will also have periodic or otherwise scheduled startup and shutdown of equipment, and steps to limit emissions during this type of event are or can be planned for. The EPA disagrees with the suggestion of commenters that because some startup or shutdown events may be unplanned, all startup and shutdown events should be exempt from compliance with any requirements. For those events that are planned, the state should be able to establish requirements to regulate emissions, such as a numerical limitation, technological control measure or work practice standard that will apply as a part of the revised emission limitation. When unplanned startup or shutdown events are part of a malfunction, they should be treated the same as a malfunction; however, as with malfunctions, startup and shutdown events cannot be exempted from compliance with SIP requirements. Questions of liability and remedy for violations that result from malfunctions are to be resolved in the context of an enforcement action, if such an action occurs.

b. Comments that it is impossible, unreasonable or impractical for states to develop emission limitations that apply during startup and shutdown to replace existing exemptions.

Comment: A number of commenters suggested that it will be difficult for states to develop emission limits that apply during startup and shutdown. One state commenter reasoned that alternative emission limits are applied to facilities in that state through individual permits on a case-by-case basis and claimed that there are 500 permitted facilities in the state. The commenter contended that "non-steady-state" limits would need to be set for startup and shutdown for all 500 permitted facilities and that such an effort would be "time, resource, and data intensive." The state commenter further contended that it would be unreasonable to require the state to include such limits "for every source" in the SIP because "permit modifications would need to occur every time there is a new emission source, a source ceases to operate, or an emission-related regulation is changed."

A local government commenter stated that to establish limits for startup and shutdown that also demonstrate compliance with the NSR regulations (including protection of the NAAQS and PSD increments and maintenance of BACT or LAER) would be a difficult, time-consuming task that was mostly impractical.

An industry commenter claimed that the EPA is encouraging states to adopt numerical alternative emission limitations in their SIP provisions that would apply during startup and shutdown. The commenter claimed that adequate and accurate emissions data are necessary to do so and that such information is not generally available for existing equipment or, in many cases, for new equipment. Furthermore, the commenter asserted, even if an emission limit could be established for startup and shutdown, there are no current approved test measures to verify compliance during such modes of operation. Even where data are available, the commenter alleged, the data may not be representative of actual conditions because of limitations related to low-load conditions. If a state lacks information to conclude that a limit can be met, the commenter argued, the state should not be required to establish numerical limits but should instead be allowed "to specify that numerical standards do not apply to those conditions or that those conditions are exempt, or should be allowed to establish work practice standards."

Response: The comments of the state commenter seem to be based on the premise that all sources will be unable to meet otherwise applicable SIP emission limitations during periods of startup and shutdown. The EPA anticipates that many types of sources should be able during startup and shutdown to meet the same emission limitation that applies during full operation. Additionally, even where a specific type of operation may not during startup and/or shutdown be able to meet an emission limitation that applies during full operation, the state should be able to develop appropriate limitations that would apply to those types of operations at all similar types of facilities. The EPA believes that there will be limited, if any, cases where it may be necessary to develop source-specific emission requirements for startup and/or shutdown. In any event, this is a question that is best addressed by each state in the context of the revisions to the SIP provisions at issue in this action. To the extent that there are appropriate reasons to establish an emission limitation with alternative numerical, technological control and/or work practice requirements during startup or shutdown for certain categories of sources, this SIP call action provides the state with the opportunity to do so.

As to the commenter's concern that such alternative emission limitations should not be included in a state's SIP, the EPA disagrees. The SIP needs to reflect the control obligations of sources, and any revision or modification of those obligations should not be occurring through a separate process, such as a permit process, which would not ensure that "alternative" compliance options do not weaken the SIP. The SIP is a combination of state statutes, regulations and other requirements that the EPA approves for demonstrating attainment and maintenance of the NAAQS, protection of PSD increments, improvement of visibility and compliance with other

[252] *See* 1999 SSM Guidance, Attachment at 4–5.

[253] The EPA notes that it has taken this approach in its own recent actions establishing emission limitations for sources. *See, e.g.*, "National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters; Final rule; notice of final action on reconsideration," 78 FR 7137 (January 31, 2013) (example of work practice requirement for startup as a component of a continuous emission limitation).

[254] The EPA notes that it has taken this approach in its own recent actions establishing emission limitations for sources. *See, e.g.*, "National Emission Standards for Hazardous Air Pollutants Residual Risk and Technology Review for Flexible Polyurethane Foam Production; Final rule," 79 FR 48073 (August 15, 2014) (example of NESHAP emission limitation that is continuous and does not include a different component for periods of startup or shutdown).

determining what is appropriate for revised SIP provisions.

d. Comments that if states remove existing SSM exemptions and replace them with alternative emission limitations that apply during startup and shutdown events, this would automatically be consistent with the requirements of CAA section 193.

Comment: Commenters stated that section 193 was included in the CAA to prohibit states from modifying regulations in place prior to November 15, 1990, unless the modification ensures equivalent or greater reductions of the pollutant. The commenters asserted that to the extent a state replaces "general excess emissions exclusions and/or affirmative defense provisions" such amendments would *per se* be more stringent than the provisions they replace. The commenters also contended that any replacement SIP provision that spells out more clearly how a source will operate ensures equivalent or greater emission reductions. The commenters urged the EPA to clarify that any revisions pursuant to a final SIP call would not be considered "backsliding."

Response: The EPA agrees with the commenters that any SIP submission made by a state in response to this SIP call action will need to comply with the requirements of section 193 of the CAA, if that section applies to the SIP provision at issue. In addition, such SIP provision will also need to comply with section 110(l), which requires that SIP revisions do not interfere with attainment, reasonable progress or any other applicable requirement of the CAA. However, it is premature to draw the conclusion that any SIP revision made by a state in response to this SIP call will automatically meet the requirements of section 110(l) and section 193. Such a conclusion could only be made in the context of reviewing the actual SIP revision. The EPA will address this issue, for each SIP revision in response to this SIP call action, at the time that it proposes and finalizes action on the SIP revision, and any comments on this issue can be raised during those individual rulemaking actions. The EPA provides additional guidance to states on the analysis needed to comply with section 110(l) and section 193 in section X.B of this document.

C. Director's Discretion Provisions Pertaining to SSM Events

1. What the EPA Proposed

In the February 2013 proposal, the EPA stated and explained in detail the reasons for its belief that the CAA prohibits unbounded director's discretion provisions in SIPs, including those provisions that purport to authorize unilateral revisions to, or exemptions from, SIP emission limitations for emissions during SSM events.[258]

2. What Is Being Finalized in This Action

The EPA is reiterating its interpretation of the CAA with respect to unbounded director's discretion provisions applicable to emissions during SSM events, which is that SIP provisions cannot contain director's discretion to alter SIP requirements, including those that allow for variances or outright exemptions for emissions during SSM events. This interpretation has been clear with respect to emissions during SSM events in the SSM Policy since at least 1999. In the 1999 SSM Guidance, the EPA stated that it would not approve SIP revisions "that would enable a State director's decision to bar EPA's or citizens' ability to enforce applicable requirements." [259] Director's discretion provisions operate to allow air agency personnel to make just such unilateral decisions on an *ad hoc* basis, up to and including the granting of complete exemptions for emissions during SSM events, thereby negating any possibility of enforcement for what would be violations of the otherwise applicable emission limitation. Given that the EPA interprets the CAA to bar exemptions from SIP emission limitations for emissions during SSM events in the first instance, the fact that director's discretion provisions operate to authorize these exemptions on an *ad hoc* basis compounds the problem. The EPA acknowledges, however, that both states and the Agency have, in some instances, failed to adhere to the requirements of the CAA with respect to this issue consistently in the past, and thus the need for this SIP call to correct existing deficiencies in SIPs.[260] In order to be clear about its interpretation of the CAA with respect to this point on a going-forward basis, the EPA is reiterating in this action that SIP provisions cannot contain unbounded director's discretion provisions, including those that operate to allow for variances or outright exemptions from SIP emission limitations for excess emissions during SSM events.

Many commenters on the February 2013 proposal opposed the EPA's interpretation of the CAA with respect to director's discretion provisions simply on the grounds that states are *per se* entitled to have unfettered discretion with respect to the content of their SIP provisions. Other commenters argued that any director's discretion provision is merely a manifestation of an air agency's general "enforcement discretion." Some commenters simply asserted that recent court decisions by the Fifth Circuit definitively establish that the CAA does not prohibit SIP provisions that include director's discretion, regardless of whether those provisions contain any limitations whatsoever on the exercise of that discretion.[261] The commenters did not, however, address the specific statutory interpretations that the EPA set forth in the February 2013 proposal to explain why SIP provisions that authorize unlimited director's discretion are prohibited by CAA provisions applicable to SIP revisions.

As explained in detail in the February 2013 proposal and in section VII.C of this document, the EPA interprets the CAA to prohibit SIP provisions that include unlimited director's discretion to alter the SIP emission limitations applicable to sources, including those that operate to allow exemptions for emissions from sources during SSM events. The EPA believes that such provisions that operate to authorize total exemptions from emission limitations on an *ad hoc* basis are especially problematic. Given that the EPA interprets section 110(a)(2)(A) and section 302(k) to preclude exemptions for emissions during SSM events in emission limitations in the first instance, it is also impermissible for states to have SIP provisions that authorize such exemptions on an *ad hoc* basis. These provisions functionally allow the air agency to impose its own enforcement discretion decisions on the EPA and other parties by granting exemptions for emissions that should be treated as violations of the applicable SIP emission limitations. Provisions that functionally allow such exemptions are also inconsistent with requirements of the CAA related to enforcement

[258] *See* February 2013 proposal, 78 FR 12459 at 12485–86.

[259] *See* 1999 SSM Guidance at 3.

[260] In this action, the EPA is addressing the specific SIP provisions with director's discretion provisions that the Petitioner listed in the Petition. In the event that there are other such impermissible director's discretion provisions in existing SIPs, the EPA will address those provisions in a later action.

[261] For example, commenters on the February 2013 proposal cited two decisions of the Fifth Circuit within which the court cited a prior EPA approval of a SIP revision in Georgia that contained director's discretion provisions supposedly comparable to those at issue in the Fifth Circuit cases. These provisions were not included in the Petition and the EPA is not reexamining those provisions as part of this action.

of the law by a source warrants enforcement and to determine the nature of the remedy to seek for any such violation. The EPA of course agrees that states have enforcement discretion of this type and that the states may exercise such enforcement discretion as they see fit, as does the Agency itself. However, the EPA does not agree that air agencies may create SIP provisions that operate to eliminate the ability of the EPA or citizens to enforce the emission limitations of the SIP. The EPA stated clearly in the 1999 SSM Guidance that it would not approve SIP provisions that "would enable a State director's decision to bar EPA's or citizens' ability to enforce applicable requirements." [264] The Agency explained at that time that such an approach is inconsistent with the requirements of the CAA applicable to the enforcement of SIPs.

The commenters' argument was that states may create SIP provisions through which they may unilaterally decide that the emissions from a source during an SSM event should be exempted, such that the emissions cannot be treated as a violation by anyone. A common formulation of such a provision provides only that the source needs to notify the state regulatory agency that an exceedance of the emission limitations occurred and to report that the emissions were the result of an SSM event. If those minimal steps occur, then such provisions commonly authorize state personnel to make an administrative decision that the emissions in question were not a "violation" of the applicable emission limitation. It may be entirely appropriate for the state agency to elect not to bring an enforcement action based on the facts and circumstances of a given SSM event, as a legitimate exercise of its own enforcement discretion. However, by creating a SIP provision that in effect authorizes the state agency to alter or suspend the otherwise applicable SIP emission limitations unilaterally through the granting of exemptions, the state agency would functionally be revising the SIP with respect to the emission limitations on the source. This revision of the applicable emission limitation would have occurred without satisfying the requirements of the CAA for a SIP revision. As a result of this *ad hoc* revision of the SIP emission limitation, the EPA and other parties would be denied the ability to exercise their own enforcement discretion. This is contrary to the fundamental enforcement structure of the CAA, as provided in section 113 and section 304, through which the EPA and other parties are authorized to bring enforcement actions for violations of SIP emission limitations. The state's decision not to exercise its own enforcement discretion cannot be a basis on which to eliminate the legal rights of the EPA and other parties to seek to enforce.

The commenters also suggested that the director's discretion provisions authorizing exemptions for SSM events are nonsegregable parts of the emission limitations, *i.e.*, that states have established the numerical limitations at overly stringent levels specifically in reliance on the existence of exemptions for any emissions during SSM events. Although commenters did not provide facts to support the claims that states set more stringent emission limitations in reliance on SSM exemptions, in general or with respect to any specific emission limitation, the EPA acknowledges that this could possibly have been the case in some instances. Even if a state had taken this approach, however, it does not follow that SIP provisions containing exemptions for SSM events are legally permissible. Emission limitations in SIPs must be continuous. When a state takes action in response to this SIP call to eliminate the director's discretion provisions or otherwise to revise them, the state may elect to overhaul the emission limitation entirely in order to address this concern. So long as the resulting revised SIP emission limitation is continuous and meets the requirements of sections 110(k)(3), 110(l) and 193 and any other sections that are germane to the type of SIP provision at issue, the state has discretion to revise the provision as it determines best.

c. Comments that the EPA's having previously approved a SIP provision that authorizes the granting of variances or exemptions for SSM events through the exercise of director's discretion renders the provision consistent with CAA requirements.

Comment: Several state and industry commenters argued that the EPA's past approval of a SIP provision with a director's discretion feature automatically means that the exercise of that authority (whether to revise the applicable SIP emission limitations unilaterally or to grant *ad hoc* exemptions from SIP emission limitations) is valid under the CAA. One commenter asserted that because the EPA has previously approved such a provision, "that discretion is itself part of the SIP, and the exercise of discretion in no way modifies SIP requirements." Another commenter argued that director's discretion provisions in SIPs are *per se* valid because "[a]ll of the SIP provisions went through a public procedure at the time of their initial SIP approval."

Response: First, the EPA disagrees with the theory that a SIP provision that includes director's discretion authority for state personnel to modify or grant exemptions from SIP emission limitations unilaterally is valid merely by virtue of the fact that the Agency previously approved it. By definition, when the EPA makes a finding of substantial inadequacy and issues a SIP call, that signifies that the Agency previously approved a SIP provision that does not meet CAA requirements, whether that deficiency existed at the time of the original approval or arose later. The EPA has explicit authority under section 110(k)(5) to require that a state eliminate or revise a SIP provision that the Agency previously approved, whenever the EPA finds an existing SIP provision to be substantially inadequate to meet CAA requirements. The fact that the EPA previously approved it does not mean that a deficient provision may remain in the SIP forever once the Agency determines that it is deficient.

Second, the EPA disagrees that the fact that a SIP provision underwent public process at the time of its original creation by the state, or at the time of its approval by EPA as part of the SIP, means *per se* that the provision is consistent with CAA requirements. If an existing SIP provision is deficient because it in effect allows a state to revise existing SIP emission limitations without meeting the many explicit statutory requirements for a SIP revision, the fact that the revision that created the impermissible provision itself met the proper procedural requirements for a SIP revision is irrelevant. Even perfect compliance with the procedural requirements for a SIP revision at the time of its development by the state or its approval by the EPA does not override a substantive deficiency in the provision, nor does it preclude the later issuance of a SIP call to correct a substantive deficiency.

Third, the EPA disagrees with the circular logic that because a deficient provision with director's discretion currently exists in a SIP, it means that exercise of the director's discretion to grant variances or outright exemptions to sources for emissions during SSM events is therefore consistent with CAA requirements for SIPs. An unbounded director's discretion provision that authorizes an air agency to alter or eliminate the otherwise applicable SIP emission limitation functionally allows the state to revise the SIP emission

[264] 1999 SSM Guidance at 3.

explained which specific provisions of the CAA preclude such a provision and why. In the February 2013 proposal and in this document, the EPA has identified and explained the specific CAA provisions that operate to preclude unbounded director's discretion provisions in SIPs.

Second, the court in the *Luminant* director's discretion case based its decision in part on the view that the specific director's discretion provision at issue in that case would always result in more stringent regulation of affected sources and always entail exercise of the discretion in a way that would protect the NAAQS.[271] Although its view was not articulated clearly in the record, the EPA did not agree with that assessment because it was not possible to evaluate in advance how the director's discretion authority would in fact be exercised. By contrast, the SIP provisions at issue in this action are not structured in such a way as to allow the exercise of discretion only to make the emission limitations *more stringent*. To the contrary, the director's discretion provisions at issue in this action authorize the state agencies to excuse sources from compliance with the otherwise applicable SIP emission limitation during SSM events. Were the sources seeking these discretionary exemptions meeting the applicable SIP emission limitations, they would not need an exemption. It logically follows that sources are seeking these exemptions because their emissions during such events are higher than the otherwise applicable emission limitation allows. Unlike the specific director's discretion provision at issue in the *Luminant* director's discretion case, which the court said "can only serve to protect the NAAQS," the exercise of the director's discretion authority in the SIP provisions at issue in this action can operate to make the emission limitations less stringent and can thereby undermine attainment and maintenance of the NAAQS, protection of PSD increments, improvement of visibility and achievement of other CAA objectives.

In the *Texas* decision, the court evaluated the EPA's disapproval of another SIP submission from the state of Texas that pertained to requirements for the permitting program for minor sources. The EPA had disapproved the submission for several different reasons, including that the Agency believed the specific provisions at issue provided the state agency with too much director's discretion authority to decide what, if any, monitoring, recordkeeping and reporting requirements should be imposed on any individual affected source in its permit. The EPA concluded that if at the time it was evaluating the SIP provision for approval it could not reasonably anticipate how the state agency would exercise the discretion authorized in the provision, this made the submission unapprovable "for being too vague and not replicable." [272] The *Texas* court disagreed. The court concluded that the "degree of discretion conferred on the TCEQ director cannot sustain the EPA's rejection of the MRR requirements" and that the EPA insisted on "some undefined limit on a director's discretion . . . based on a standard that the CAA does not empower the EPA to enforce." [273]

The EPA believes that the decision of the court in *Texas* v. *EPA* is also distinguishable with respect to the issue of whether director's discretion provisions are consistent with CAA requirements. First, the *Texas* court based its decision primarily on the conclusion that the EPA had failed to identify and explain the provisions of the CAA that (i) preclude approval of SIP provisions that include unbounded director's discretion or (ii) impose a requirement for "replicability" in the exercise of director's discretion. The *Texas* court emphasized that although the EPA disapproved the SIP submission for failure to meet CAA requirements, the court found that the EPA "is yet to explain why." [274] The court further reasoned that "the EPA has invoked the term 'director discretion' as if that term were an independent and authoritative standard, and has not linked the term to language of the CAA." [275] Later in the opinion the court explicitly emphasized that because it was reviewing the EPA's decisionmaking process in the disapproval action, the court could not consider any basis for the disapproval that was not articulated by the EPA in the rulemaking record.[276] The EPA is explaining its interpretation of the relevant CAA provisions in this action.

Second, the *Texas* court also asserted its own conclusion that there is nothing in the CAA that pertains to director's discretion in SIP provisions or to any limitations on the exercise of such discretion. As the court stated it:

> There is, in fact, no independent and authoritative standard in the CAA or its implementing regulations requiring that a state director's discretion be cabined in the way that the EPA suggests. Therefore, the EPA's insistence on some undefined limit on a director's discretion is . . . based on a standard that the CAA does not empower the EPA to enforce.

However, the court reached this conclusion based upon the administrative record before it and reiterated that it could not consider any basis for the disapproval not articulated by the EPA in the rulemaking record: "We are reviewing an agency's decisionmaking process, so the agency's action must be upheld, if at all, on the basis articulated by the agency itself." [277] Given the court's conclusion that the EPA had failed to provide any explanation as to why the CAA precludes director's discretion provisions in the challenged rulemaking, the EPA believes that the court did not have the opportunity to consider the Agency's rationale that is provided in this action. In the February 2013 proposal and in this document, the EPA is heeding the court's admonishment to explain in the rulemaking record the statutory basis for the Agency's interpretation of the CAA to prohibit director's discretion provisions that are inadequately bounded. As explained in this action, SIP provisions that functionally authorize a state agency to amend existing SIP emission limitations applicable to a source unilaterally without a SIP revision are contrary to multiple specific provisions of the CAA that pertain to SIP revisions.

Third, the *Texas* court emphasized that, notwithstanding the apparent flexibility that the director's discretion provision provided to the state agency with respect to deciding on the level of monitoring, recordkeeping and reporting to be imposed on each source by permit, the state's regulations explicitly prohibited relaxations of the level of control. The court gave weight to the explicit wording of the specific provision at issue in the case which provided that "[t]he existing level of control may not be lessened for any facility." [278] The EPA does not agree that the specific requirements for monitoring, recordkeeping and reporting for a given source are unrelated to the level of control. In any event, the director's discretion provisions of the type at issue in this

[271] *Luminant Generation Co.* v. *EPA*, 675 F.3d 917, 929 n.11 ("The provision at issues states: "This standard permit must not be used [if] the executive director determines there are health effects concerns or the potential to exceed a [NAAQS] . . . until those concerns are addressed to the satisfaction of the executive director.").

[272] *Id.*, 690 F.3d 670, 680.

[273] *Id.*, 690 F.3d 670, 682.

[274] *Id.*, 690 F.3d 670, 681.

[275] *Id.*

[276] *Id.*, 690 F.3d 670, 682.

[277] *Id.*, 690 F.3d 670, 682.

[278] *Id.*, 690 F.3d 670, 681.

emission limitation in a SIP provision (or an EPA regulation promulgated pursuant to sections 111 or 112), section 116 explicitly stipulates, "such State or political subdivision may not adopt or enforce any emission standard or emission limitation which is less stringent than the standard or limitation under such plan or limitation." Thus, a state could elect to regulate a source more stringently than required by a specific SIP emission limitation (*e.g.*, by imposing a more stringent numerical emission limitation on a particular source or by imposing additional recordkeeping, reporting and monitoring requirements in addition to those of the SIP provision), but the state cannot weaken or eliminate the SIP emission limitation (*e.g.*, by granting exemptions from applicable SIP emission limitations for emissions during SSM events). If a state elects to alter an emission limitation in a SIP provision, the state must do so in accordance with the statutory provisions applicable to SIP revisions.

Finally, the EPA notes, if a state elects to use a permitting process as a source-by-source means of imposing more stringent emission limitations or additional requirements on sources, doing so can be an acceptable approach. So long as the underlying SIP provisions are adequate to provide the requisite level of control or requirements to assure enforceability, a state is free to use a permitting program to impose additional requirements above and beyond those provided in the SIP.

D. Enforcement Discretion Provisions Pertaining to SSM Events

1. What the EPA Proposed

In the February 2013 proposal, the EPA explained in detail that it believes that the CAA allows states to adopt SIP provisions that impose reasonable limits upon the exercise of enforcement discretion by air agency personnel, so long as those provisions do not apply to the EPA or other parties. The EPA believes that its interpretation of the CAA with respect to enforcement discretion provisions applicable to emissions during SSM events has been clear in the SSM Policy. In the 1982 SSM Guidance and the 1983 SSM Guidance, the EPA indicated that states could elect to adopt SIP provisions that include criteria that apply to the exercise of enforcement discretion by state personnel. In the 1999 SSM Guidance, the EPA emphasized that it would not approve such provisions if they would operate to impose the state's enforcement discretion decisions upon the EPA or other parties because this would be inconsistent with requirements of title I of the CAA.[279] The EPA acknowledged, however, that both the states and the Agency have failed to adhere to the CAA with respect to this issue in the past, and thus the need for this SIP call action to correct the existing deficiencies in SIPs.

2. What Is Being Finalized in This Action

In order to be clear about this important point on a going-forward basis, the EPA is reiterating that SIP provisions cannot contain enforcement discretion provisions that would bar enforcement by the EPA or citizens for any violation of SIP requirements if the state elects not to enforce.

The EPA has previously issued a SIP call to a state specifically for purposes of clarifying an existing SIP provision to assure that regulated entities, regulators and courts will not misunderstand the correct interpretation of the provision.[280] As the EPA stated in that action:

> . . . SIP provisions that give exclusive authority to a state to determine whether an enforcement action can be pursued for an exceedance of an emission limit are inconsistent with the CAA's regulatory scheme. EPA and citizens, and any court in which they seek to file an enforcement claim, must retain the authority to independently evaluate whether a source's exceedance of an emission limit warrants enforcement action.[281]

The EPA has explained in previous iterations of its SSM Policy that a fundamental principle of the CAA with respect to SIP provisions is that the provisions must be enforceable not only by the state but also by the EPA and others pursuant to the citizen suit authority of section 304. Accordingly, the EPA has long stated that SIP provisions cannot be structured such that a decision by the state not to enforce may bar enforcement by the EPA or other parties.

3. Response to Comments

The EPA received a small number of comments concerning the issue of ambiguous enforcement discretion provisions in SIPs. For clarity and ease of discussion, the EPA is responding to these comments, grouped by issue, in this section of this document.

a. Comments that supported the clarification of ambiguous enforcement discretion provisions in general but opposed the EPA's views with respect to specific SIP provisions.

Comment: Environmental group commenters disagreed with the EPA's proposed denial of the Petition with respect to specific enforcement discretion provisions in the SIPs of several states. The commenters contended that the SIP provisions are too ambiguous for courts to recognize that the exercise of enforcement discretion by state personnel did not preclude enforcement by the EPA or others.

Response: The EPA disagrees with these comments. In the February 2013 proposal, the EPA explained how it reads the specific enforcement discretion provisions in the SIPs of each of these states. The EPA explained its evaluation of these provisions in detail. In comments submitted on the February 2013 proposal, the states in question agreed with the EPA's reading of the provisions. Each state agreed that these provisions only applied to air agency personnel and not to the EPA or any other party. Thus, the EPA believes that there should be no dispute about the proper interpretation of these SIP provisions in any potential future enforcement action.

b. Comments that opposed the EPA's issuing SIP calls to obtain state agency clarification of ambiguous enforcement discretion provisions in SIPs.

Comment: One commenter asserted that requiring states to correct an ambiguous "enforcement discretion" provision in its SIP in order to eliminate "perceived ambiguity" is a "waste of resources." Although agreeing that a state's exercise of enforcement discretion cannot affect enforcement by the EPA or other parties under the citizen suit provision, the commenter believed that the existence of ambiguous provisions that could be misconstrued by a court to bar enforcement by the EPA or others if the state elects not to enforce is not a significant concern.

Response: The EPA agrees with the commenter that a state's legitimate exercise of enforcement discretion not to enforce in the event of violations of SIP provisions should have no bearing whatsoever on whether the EPA or others may seek to enforce for the same violations. However, the Agency disagrees with the commenter concerning whether some SIP provisions need to be clarified in order to assure that this principle is adhered to in practice in enforcement actions. For example, if on the face of an approved SIP provision the state

[279] *See* 1999 SSM Guidance at 3.

[280] *See* "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision," 75 FR 70888 at 70892–93 (November 19, 2010) (proposed SIP call, *inter alia*, to rectify an enforcement discretion provision that in fact appeared to bar enforcement by the EPA or citizens if the state decided not to enforce).

[281] *See id.*

changed its views about such provisions and that its prior views expressed in the 1999 SSM Guidance and related rulemakings on SIP submissions were incorrect. In this fashion, the EPA's action on the Petition provides updated guidance relevant to future SIP actions.

Second, the EPA only intends its actions on the specific existing SIP provisions identified in the Petition to be applicable to those provisions. The EPA does not intend its action on those specific provisions to alter the current status of any other existing SIP provisions relating to SSM events. The EPA must take later rulemaking actions, if necessary, in order to evaluate any comparable deficiencies in other existing SIP provisions that may be inconsistent with the requirements of the CAA. Again, however, the EPA's actions on the Petition provide updated guidance on the types of SIP provisions that it believes would be consistent with CAA requirements in future rulemaking actions.

Third, the EPA does not intend its action on the Petition to affect immediately any existing permit terms or conditions regarding excess emissions during SSM events that reflect previously approved SIP provisions. The EPA's finding of substantial inadequacy and a SIP call for a given state provides the state time to revise its SIP in response to the SIP call through the necessary state and federal administrative process. Thereafter, any needed revisions to existing permits will be accomplished in the ordinary course as the state issues new permits or reviews and revises existing permits. The EPA does not intend the issuance of a SIP call to have automatic impacts on the terms of any existing permit.

Fourth, the EPA does not intend its action on the Petition to alter the emergency defense provisions at 40 CFR 70.6(g) and 40 CFR 71.6(g), *i.e.*, the title V regulations pertaining to "emergency provisions" permissible in title V operating permits. The EPA's regulations applicable to title V operating permits may only be changed through appropriate rulemaking procedures and existing permit terms may only be changed through established permitting processes.

Fifth, the EPA does not intend its interpretations of the requirements of the CAA in this action on the Petition to be legally dispositive with respect to any particular current enforcement proceedings in which a violation of SIP emission limitations is alleged to have occurred. The EPA handles enforcement matters by assessing each situation, on a case-by-case basis, to determine the appropriate response and resolution. For purposes of alleged violations of SIP provisions, however, the terms of the applicable SIP provision will continue to govern until that provision is revised following the appropriate process for SIP revisions, as required by the CAA.

Finally, the EPA does intend this final action, developed through notice and comment, to be the statement of its most current SSM Policy, reflecting the EPA's interpretation of CAA requirements applicable to SIP provisions related to excess emissions during SSM events. In this regard, the EPA is adding to and clarifying its prior statements in the 1999 SSM Guidance and making the specific changes to that guidance as discussed in this action. Thus, this final notice for this action will constitute the EPA's SSM Policy on a going-forward basis.

VIII. Legal Authority, Process and Timing for SIP Calls

A. SIP Call Authority Under Section 110(k)(5)

1. General Statutory Authority

The CAA provides a mechanism for the correction of flawed SIPs, under CAA section 110(k)(5), which provides that "[w]henever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standards, to mitigate adequately the interstate pollutant transport described in section [176A] of this title or section [184] of this title, or to otherwise comply with any requirement of [the Act], the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions."

By its explicit terms, this provision authorizes the EPA to find that a state's existing SIP is "substantially inadequate" to meet CAA requirements and, based on that finding, to "require the State to revise the [SIP] as necessary to correct such inadequacies." This type of action is commonly referred to as a "SIP call." [289]

Significantly, CAA section 110(k)(5) explicitly authorizes the EPA to issue a SIP call "whenever" the EPA makes a finding that the existing SIP is substantially inadequate, thus providing authority for the EPA to take action to correct existing inadequate SIP provisions even long after their initial approval, or even if the provisions only become inadequate due to subsequent events.[290] The statutory provision is worded in the present tense, giving the EPA authority to rectify any deficiency in a SIP that currently exists, regardless of the fact that the EPA previously approved that particular provision in the SIP and regardless of when that approval occurred.

It is also important to emphasize that CAA section 110(k)(5) expressly directs the EPA to take action if the SIP provision is substantially inadequate, not just for purposes of attainment or maintenance of the NAAQS but also for purposes of "any requirement" of the CAA. The EPA interprets this reference to "any requirement" of the CAA on its face to authorize reevaluation of an existing SIP provision for compliance with those statutory and regulatory requirements that are germane to the SIP provision at issue. Thus, for example, a SIP provision that is intended to be an "emission limitation" for purposes of a nonattainment plan for purposes of the 1997 $PM_{2.5}$ NAAQS must meet various applicable statutory and regulatory requirements, including requirements of CAA section 110(a)(2)(A) such as enforceability, the definition of the term "emission limitation" in CAA section 302(k), the level of emissions control

[289] The EPA also has other discretionary authority to address incorrect SIP provisions, such as the authority in CAA section 110(k)(6) for the EPA to correct errors in prior SIP approvals. The authority in CAA section 110(k)(5) and CAA section 110(k)(6) can sometimes overlap and offer alternative mechanisms to address problematic SIP provisions. In this instance, the EPA believes that the mechanism provided by CAA section 110(k)(5) is the better approach, because using the mechanism of the CAA section 110(k)(6) error correction would eliminate the affected emission limitations from the SIP potentially leaving no emission limitation in place, whereas the mechanism of the CAA section 110(k)(5) SIP call will keep the provisions in place during the pendency of the state's revision of the SIP and the EPA's action on that revision. In the case of provisions that include impermissible automatic exemptions or discretionary exemptions, the EPA believes that retention of the existing SIP provision is preferable to the absence of the provision in the interim.

[290] *See, e.g., Michigan* v. *EPA*, 213 F.3d 663 (D.C. Cir. 2000) (upholding the "NO_X SIP Call" to states requiring revisions to previously approved SIPs with respect to ozone transport and section 110(a)(2)(D)(i)(I)); "Action to Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call; Final rule," 75 FR 77698 (December 13, 2010) (the EPA issued a SIP call to 13 states because the endangerment finding for GHGs meant that these previously approved SIPs were substantially inadequate because they did not provide for the regulation of GHGs in the PSD permitting programs of these states as required by CAA section 110(a)(2)(C) and section 110(a)(2)(J)); "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision," 74 FR 21639 (April 18, 2011) (the EPA issued a SIP call to rectify SIP provisions dating back to 1980).

construe the ambiguous SIP provision to bar enforcement, then the EPA believes that it may be appropriate to take action to eliminate that uncertainty by requiring the state to revise the ambiguous SIP provision. Under such circumstances, it may be appropriate for the EPA to issue a SIP call to assure that the SIP provisions are sufficiently clear and consistent with CAA requirements on their face.[296]

In this instance, the Petition raised questions concerning the adequacy of existing SIP provisions that pertain to the treatment of excess emissions during SSM events. The SIP provisions identified by the Petitioner generally fall into four major categories: (i) Automatic exemptions; (ii) exemptions as a result of director's discretion; (iii) provisions that appear to bar enforcement by the EPA or through a citizen suit if the state decides not to enforce through exercise of enforcement discretion; and (iv) affirmative defense provisions that purport to limit or eliminate a court's jurisdiction to assess liability and impose remedies for exceedances of SIP emission limitations. The EPA believes that each of these types of SIP deficiency potentially justifies a SIP call pursuant to CAA section 110(k)(5), if the Agency determines that a SIP call is the proper means to rectify an existing deficiency in a SIP.

2. Substantial Inadequacy of Automatic Exemptions

The EPA believes that SIP provisions that provide an automatic exemption from otherwise applicable emission limitations are substantially inadequate to meet CAA requirements. A typical SIP provision that includes an impermissible automatic exemption would provide that a source has to meet a specific emission limitation, except during startup, shutdown and malfunction, and by definition any excess emissions during such events would not be violations and thus there could be no enforcement based on those excess emissions. The EPA's interpretation of CAA requirements for SIP provisions has been reiterated multiple times through the SSM Policy and actions on SIP submissions that pertain to this issue. The EPA's longstanding view is that SIP provisions that include automatic exemptions for excess emissions during SSM events, such that the excess emissions during those events are not considered violations of the applicable emission limitations, do not meet CAA requirements. Such exemptions undermine the attainment and maintenance of the NAAQS, protection of PSD increments and improvement of visibility, and SIP provisions that include such exemptions fail to meet these and other fundamental requirements of the CAA.

The EPA interprets CAA sections 110(a)(2)(A) and 110(a)(2)(C) to require that SIPs contain "emission limitations" to meet CAA requirements. Pursuant to CAA section 302(k), those emission limitations must be "continuous." Automatic exemptions from otherwise applicable emission limitations thus render those limits less than continuous as required by CAA sections 302(k), 110(a)(2)(A) and 110(a)(2)(C), thereby inconsistent with a fundamental requirement of the CAA and thus substantially inadequate as contemplated in CAA section 110(k)(5).

This inadequacy has far-reaching impacts. For example, air agencies rely on emission limitations in SIPs in order to provide for attainment and maintenance of the NAAQS. These emission limitations are often used by air agencies to meet various requirements including: (i) In the estimates of emissions for emissions inventories; (ii) in the determination of what level of emissions meets various statutory requirements such as "reasonably available control measures" in nonattainment SIPs or "best available retrofit technology" in regional haze SIPs; and (iii) in critical modeling exercises such as attainment demonstration modeling for nonattainment areas or increment use for PSD permitting purposes.

Because the NAAQS are not directly enforceable against individual sources, air agencies rely on the adoption and enforcement of these generic and specific emission limitations in SIPs in order to provide for attainment and maintenance of the NAAQS, protection of PSD increments and improvement of visibility, and to meet other CAA requirements. Automatic exemption provisions for excess emissions eliminate the possibility of enforcement for what would otherwise be clear violations of the relied-upon emission limitations and thus eliminate any opportunity to obtain injunctive relief that may be needed to protect the NAAQS or meet other CAA requirements. Likewise, the elimination of any possibility for penalties for what would otherwise be clear violations of the emission limitations, regardless of the conduct of the source, eliminates any opportunity for penalties to encourage appropriate design, operation and maintenance of sources and to encourage efforts by source operators to prevent and to minimize excess emissions in order to protect the NAAQS or to meet other CAA requirements. Removal of this monetary incentive to comply with the SIP reduces a source's incentive to design, operate, and maintain its facility to meet emission limitations at all times.

3. Substantial Inadequacy of Director's Discretion Exemptions

The EPA believes that SIP provisions that allow discretionary exemptions from otherwise applicable emission limitations are substantially inadequate to meet CAA requirements for the same reasons as automatic exemptions, but for additional reasons as well. A typical SIP provision that includes an impermissible "director's discretion" component would purport to authorize air agency personnel to modify existing SIP requirements under certain conditions, *e.g.*, to grant a variance from an otherwise applicable emission limitation if the source could not meet the requirement in certain circumstances.[297] If such provisions are sufficiently specific, provide for sufficient public process and are sufficiently bounded, so that it is possible to anticipate at the time of the EPA's approval of the SIP provision how that provision will actually be applied and the potential adverse impacts thereof, then such a provision might meet basic CAA requirements. In essence, if it is possible to anticipate and evaluate in advance how the exercise of enforcement discretion could impact compliance with other CAA requirements, then it may be possible to determine in advance that the preauthorized exercise of director's discretion will not interfere with other CAA requirements, such as providing for attainment and maintenance of the

where states had approved alternative emission limitations under procedures the EPA had approved in the SIP); *Florida Power & Light Co.* v. *Costle*, 650 F.2d 579, 588 (5th Cir. 1981) (the EPA to be accorded no discretion in interpreting state law). The EPA does not agree with the holdings of these cases, but they illustrate why it is reasonable to eliminate any uncertainty about enforcement authority by requiring a state to remove or revise a SIP provision that could be read in a way inconsistent with the requirements of the CAA.

[296] *See US Magnesium, LLC* v. *EPA*, 690 F.3d 1157, 1170 (10th Cir. 2012) (upholding the EPA's use of SIP call authority in order to clarify language in the SIP that could be read to violate the CAA, even if a court has not yet interpreted the language in that way).

[297] The EPA notes that problematic "director's discretion" provisions are not limited only to those that purport to authorize alternative emission limitations from those required in a SIP. Other problematic director's discretion provisions could include those that purport to provide for discretionary changes to other substantive requirements of the SIP, such as applicability, operating requirements, recordkeeping requirements, monitoring requirements, test methods, and alternative compliance methods.

In addition, discretionary exemptions undermine effective enforcement of the SIP by the EPA or through a citizen suit, because often there may have been little or no public process concerning the exercise of director's discretion to grant the exemptions, or easily accessible documentation of those exemptions, and thus even ascertaining the possible existence of such *ad hoc* exemptions will further burden parties who seek to evaluate whether a given source is in compliance or to pursue enforcement if it appears that the source is not. Where there is little or no public process concerning such *ad hoc* exemptions, or there is inadequate access to relevant documentation of those exemptions, enforcement by the EPA or through a citizen suit may be severely compromised. As explained in the 1999 SSM Guidance, the EPA does not interpret the CAA to allow SIP provisions that would allow the exercise of director's discretion concerning violations to bar enforcement by the EPA or through a citizen suit. The exercise of director's discretion to exempt conduct that would otherwise constitute a violation of the SIP would interfere with effective enforcement of the SIP. Such provisions are inconsistent with and undermine the enforcement structure of the CAA provided in CAA sections 113 and 304, which provide independent authority to the EPA and citizens to enforce SIP provisions, including emission limitations. Thus, SIP provisions that allow discretionary exemptions from applicable SIP emission limitations through the exercise of director's discretion are substantially inadequate to comply with CAA requirements as contemplated in CAA section 110(k)(5).

4. Substantial Inadequacy of Improper Enforcement Discretion Provisions

The EPA believes that SIP provisions that pertain to enforcement discretion but could be construed to bar enforcement by the EPA or through a citizen suit if the air agency declines to enforce are substantially inadequate to meet CAA requirements. A typical SIP provision that includes an impermissible enforcement discretion provision specifies certain parameters for when air agency personnel should pursue enforcement action, but is worded in such a way that the air director's decision defines what constitutes a "violation" of the emission limitation for purposes of the SIP, *i.e.*, by defining what constitutes a violation, the air agency's own enforcement discretion decisions are imposed on the EPA or citizens.[301]

The EPA's longstanding view is that SIP provisions cannot enable an air agency's decision concerning whether or not to pursue enforcement to bar the ability of the EPA or the public to enforce applicable requirements.[302] Such enforcement discretion provisions in a SIP would be inconsistent with the enforcement structure provided in the CAA. Specifically, the statute provides explicit independent enforcement authority to the EPA under CAA section 113 and to citizens under CAA section 304. Thus, the CAA contemplates that the EPA and citizens have authority to pursue enforcement for a violation even if the air agency elects not to do so. The EPA and citizens, and any court in which they seek to pursue an enforcement claim for violation of SIP requirements, must retain the authority to evaluate independently whether a source's violation of an emission limitation warrants enforcement action. Potential for enforcement by the EPA or through a citizen suit provides an important safeguard in the event that the air agency lacks resources or ability to enforce violations and provides additional deterrence. Accordingly, a SIP provision that operates at the air agency's election to eliminate the authority of the EPA or the public to pursue enforcement actions would undermine the enforcement structure of the CAA and would thus be substantially inadequate to meet fundamental requirements in CAA sections 113 and 304.

5. Substantial Inadequacy of Affirmative Defense Provisions

The EPA believes that SIP provisions that provide an affirmative defense for excess emissions during SSM events are substantially inadequate to meet CAA requirements. A typical SIP provision that includes an impermissible affirmative defense operates to limit or eliminate the jurisdiction of federal courts to assess liability or to impose remedies in an enforcement proceeding for exceedances of SIP emission limitations. Some affirmative defense provisions apply broadly, whereas others are components of specific emission limitations. Some provisions use the explicit term "affirmative defense," whereas others are structured as such provisions but do not use this specific terminology. All of these provisions, however, share the same legal deficiency in that they purport to alter the statutory jurisdiction of federal courts under section 113 and section 304 to determine liability and to impose remedies for violations of CAA requirements, including SIP emission limitations. Accordingly, an affirmative defense provision that operates to limit or to eliminate the jurisdiction of the federal courts would undermine the enforcement structure of the CAA and would thus be substantially inadequate to meet fundamental requirements in CAA sections 113 and 304. By undermining enforcement, such provisions also are inconsistent with fundamental CAA requirements such as attainment and maintenance of the NAAQS, protection of PSD increments and improvement of visibility.

B. SIP Call Process Under Section 110(k)(5)

Section 110(k)(5) of the CAA provides the EPA with authority to determine whether a SIP is substantially inadequate to attain or maintain the NAAQS or otherwise comply with any requirement of the CAA. Where the EPA makes such a determination, the EPA then has a duty to issue a SIP call.

In addition to providing general authority for a SIP call, CAA section 110(k)(5) sets forth the process and timing for such an action. First, the statute requires the EPA to notify the state of the final finding of substantial inadequacy. The EPA typically provides notice to states by a letter from the Assistant Administrator for the Office of Air and Radiation to the appropriate state officials in addition to publication of the final action in the **Federal Register**.

Second, the statute requires the EPA to establish "reasonable deadlines (not to exceed 18 months after the date of such notice)" for states to submit corrective SIP submissions to eliminate the inadequacy in response to the SIP call. The EPA proposes and takes comment on the schedule for the submission of corrective SIP revisions in order to ascertain the appropriate timeframe, depending on the nature of the SIP inadequacy.

Third, the statute requires that any finding of substantial inadequacy and notice to the state be made public. By undertaking a notice-and-comment rulemaking, the EPA assures that the air agencies, affected sources and members of the public all are adequately

[301] *See, e.g.*, "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision," 75 FR 70888 at 70892 (November 19, 2010). The SIP provision at issue provided that information concerning a malfunction "shall be used by the executive secretary in determining whether a violation has occurred and/or the need of further enforcement action." This SIP language appeared to give the state official exclusive authority to determine whether excess emissions constitute a violation.

[302] *See* 1999 SSM Guidance at 3.

Office as they develop the SIP revisions. The EPA intends to review and act upon the SIP submissions as promptly as resources will allow, in order to correct these deficiencies in as timely a manner as possible. Recent experience with several states that elected to correct the deficiencies identified in the February 2013 proposal in advance of this final action suggests that these SIP revisions can be addressed efficiently through cooperation between the air agencies and the EPA.

The EPA notes that the SIP call for affected states finalized in this action is narrow and applies only to the specific SIP provisions determined to be inconsistent with the requirements of the CAA. To the extent that a state is concerned that elimination of a particular aspect of an existing emission limitation, such as an impermissible exemption, will render that emission limitation more stringent than the state originally intended and more stringent than needed to meet the CAA requirements it was intended to address, the EPA anticipates that the state will revise the emission limitation accordingly, but without the impermissible exemption or other feature that necessitated the SIP call. With adequate justification, this SIP revision might, *e.g.*, replace a numerical emission limitation with an alternative control method (design, equipment, work practice or operational standard) as a component of the emission limitation applicable during startup and/or shutdown periods.

The EPA emphasizes that its authority under CAA section 110(k)(5) does not extend to requiring a state to adopt a particular control measure in its SIP revision in response to the SIP call. Under principles of cooperative federalism, the CAA vests air agencies with substantial discretion in how to develop SIP provisions, so long as the provisions meet the legal requirements and objectives of the CAA.[306] Thus, the inclusion of a SIP call to a state in this action should not be misconstrued as a directive to the state to adopt a particular control measure. The EPA is merely requiring that affected states make SIP revisions to remove or revise existing SIP provisions that fail to comply with fundamental requirements of the CAA. The states retain discretion to remove or revise those provisions as they determine best, so long as they bring their SIPs into compliance with the requirements of the CAA.[307] Through this rulemaking action, the EPA is reiterating, clarifying and updating its interpretations of the CAA with respect to SIP provisions that apply to emissions from sources during SSM events in order to provide states with comprehensive guidance concerning such provisions.

Finally, the EPA notes that under section 553 of the Administrative Procedure Act, 5 U.S.C. 553(d), an agency rule should not be "effective" less than 30 days after its publication, unless certain exceptions apply including an exception for "good cause." In this action, the EPA is simultaneously taking final action on the Petition, issuing its revised SSM Policy guidance to states for SIP provisions applicable to emissions during SSM events and issuing a SIP call to 36 states for specific existing SIP provisions that it has determined to be substantially inadequate to meet CAA requirements. Section 110(k)(5) provides that the EPA must notify states affected by a SIP call and must establish a deadline for SIP submissions by affected states in response to a SIP call not to exceed 18 months after the date of such notification. The EPA is notifying affected states of this final SIP call action on May 22, 2015. Thus, regardless of the effective date of this action, the deadline for submission of SIP revisions to address the specific SIP provisions that the EPA has identified as substantially inadequate will be November 22, 2016. In addition, the EPA concludes that there is good cause for this final action to be effective on May 22, 2015, the day upon which the EPA provided notice to the states, because any delayed effective date would be unnecessary given that CAA section 110(k)(5) explicitly provides that the deadline for submission of the required SIP revisions runs from the date of notification to the affected states, not from some other date, and shall not exceed 18 months.

D. Response to Comments Concerning SIP Call Authority, Process and Timing

The EPA received a wide range of comments on the February 2013 proposal and the SNPR questioning the scope of the Agency's authority to issue this SIP call action under section 110(k)(5), the process followed by EPA for this SIP call action, or the timing that the EPA provided for response to this SIP call action. Although there were numerous comments on these general topics, the majority of the comments raised the same questions and made similar arguments (*e.g.*, that the EPA has an obligation under section 110(k)(5) to "prove" not only that an exemption for SSM events in a SIP emission limitation is contrary to the explicit legal requirements of the CAA but also that this illegal exemption "caused" a specific violation of the NAAQS at a particular monitor on a particular day). For clarity and ease of discussion, the EPA is responding to these overarching comments, grouped by topic, in this section of this document.

1. Comments that section 110(k)(5) requires the EPA to "prove causation" to have authority to issue a SIP call.

Comment: Numerous state and industry commenters argued that the EPA has no authority to issue a SIP call with respect to a given SIP provision unless and until the Agency first proves definitively that the provision has caused a specific harm, such as a specific violation of the NAAQS in a specific area. These commenters generally focused upon the "attainment and maintenance" clause of section 110(k)(5) and did not address the "comply with any requirement of" the CAA clause.

For example, many industry commenters opposed the EPA's interpretation of section 110(k)(5) on the grounds that the Agency had failed to provide a specific technical analysis "proving" how the SIP provisions failed to provide for attainment or maintenance of the NAAQS. For areas attaining the NAAQS, commenters asserted that there should be a presumption that existing SIP provisions are adequate if they have resulted in attainment of the NAAQS. For areas violating the NAAQS, commenters claimed that the EPA is required to conduct a technical analysis to determine if there is a "nexus between the provisions that are the subject of its SSM SIP Call Proposal and the specific pollutants for which attainment has not been achieved." Other industry commenters argued that in order to have authority to issue a SIP call, the EPA must prove through a technical analysis that a given SIP provision "is" substantially inadequate, not that it "may be." These commenters claimed that the EPA has not shown how any of the SIP provisions at issue in this action "threatens the NAAQS, fails to sufficiently mitigate interstate transport, or comply with any other

[306] *See Virginia* v. *EPA*, 108 F.3d 1397 (D.C. Cir. 1997) (SIP call remanded and vacated because, *inter alia*, the EPA had issued a SIP call that required states to adopt a particular control measure for mobile sources).

[307] Notwithstanding the latitude states have in developing SIP provisions, the EPA is required to assure that states meet the basic legal criteria for SIPs. *See Michigan* v. *EPA*, 213 F.3d 663, 686 (D.C. Cir. 2000) (upholding NO_x SIP call because, *inter alia*, the EPA was requiring states to meet basic legal requirement that SIPs comply with section 110(a)(2)(D), not dictating the adoption of a particular control measure).

include a PSD permitting program that addresses all federally regulated air pollutants, including GHGs. In that action, the EPA made a finding that the SIPs of 13 states were substantially inadequate to "comply with any requirement" of the CAA because the PSD permitting programs in their EPA-approved SIPs did not apply to GHG emissions from new and modified sources. Accordingly, the EPA issued a SIP call to the 13 states because their SIPs failed to comply with specific legal requirements of the CAA. This failure to meet an explicit CAA legal requirement to address GHG emissions in permits for sources as required by statute did not require the EPA to provide a technical analysis of the specific environmental impacts that this substantial inadequacy would cause. For this type of SIP deficiency, it was sufficient for the EPA to make a factual finding that the affected states had SIPs that failed to meet this fundamental legal requirement.[312] The EPA has issued other SIP calls for which the Agency made a finding that a state's failure to meet specific legal requirement of the CAA for SIPs was a substantial inadequacy without the need to provide a technical air quality analysis relating to NAAQS violations.[313]

The EPA believes that the most relevant precedent for what is necessary to support a finding of substantial inadequacy in this action is the SIP call that the Agency previously issued to the state of Utah for deficient SIP provisions related to the treatment of excess emissions during SSM events.[314] In that SIP call action, the EPA made a finding that two specific provisions in the state's SIP were substantially inadequate because they were inconsistent with legal requirements of the CAA. For one of the provisions that included an exemption for emissions during "upsets" (*i.e.*, malfunctions), the EPA explained:

> Contrary to CAA section 302(k)'s definition of emission limitation, the exemption [in the provision] renders emission limitations in the Utah SIP less than continuous and, contrary to the requirements of CAA sections 110(a)(2)(A) and (C), undermines the ability to ensure compliance with SIP emissions limitations relied on to achieve the NAAQS and other relevant CAA requirements at all times. Therefore, the [provision] renders the Utah SIP substantially inadequate to attain or maintain the NAAQS or to comply with other CAA requirements such as CAA sections 110(a)(2)(A) and (C) and 302(k), CAA provisions related to prevention of significant deterioration (PSD) and nonattainment NSR permits (sections 165 and 173), and provisions related to protection of visibility (section 169A).[315]

For a second provision, the EPA made a finding of substantial inadequacy because the provision interfered with the enforcement structure of the CAA. The EPA explained:

> This provision appears to give the executive secretary exclusive authority to determine whether excess emissions constitute a violation and thus to preclude independent enforcement action by EPA and citizens when the executive secretary makes a non-violation determination. This is inconsistent with the enforcement structure under the CAA, which provides enforcement authority not only to the States, but also to EPA and citizens. . . . Because it undermines the envisioned enforcement structure, it also undermines the ability of the State to attain and maintain the NAAQS and to comply with other CAA requirements related to PSD, visibility, NSPS, and NESHAPS.[316]

In the Utah SIP call rulemaking, the EPA received similar adverse comments arguing that the Agency has no authority under section 110(k)(5) to issue a SIP call without a factual analysis that proves that the deficient SIP provisions caused a specific environmental harm, such as a NAAQS violation. Commenters in that rulemaking likewise argued that the EPA was required to prove a causal connection between the excess emissions that occurred during a specific exempt malfunction and a specific violation of the NAAQS. In response to those comments, the EPA explained:

> [W]e need not show a direct causal link between any specific unavoidable breakdown excess emissions and violations of the NAAQS to conclude that the SIP is substantially inadequate. It is our interpretation that the fundamental integrity of the CAA's SIP process and structure is undermined if emission limits relied on to meet CAA requirements can be exceeded without potential recourse by any entity granted enforcement authority by the CAA. We are not restricted to issuing SIP calls only after a violation of the NAAQS has occurred or only where a specific violation can be linked to a specific excess emissions event.[317]

The EPA's interpretation of section 110(k)(5) in the Utah action was directly challenged in *US Magnesium, LLC* v. *EPA*.[318] Among other claims, the petitioners argued that the EPA did not have authority for the SIP call because the Agency had not "set out facts showing that the [SIP provision] has prevented Utah from attaining or maintaining the NAAQS or otherwise complying with the CAA." Thus, the same arguments raised by commenters in this action have previously been advanced and rejected by the EPA and the courts. The court expressly upheld the EPA's interpretation of section 110(k)(5), concluding:

> Certainly, a SIP could be deemed substantially inadequate because air-quality records showed that actions permitted under the SIP resulted in NAAQS violations, but the statute can likewise apply to a situation like this, where the EPA determines that a SIP is no longer consistent with the EPA's understanding of the CAA. In such a case, the CAA permits the EPA to find that a SIP is substantially inadequate to comply with the CAA, which would allow the EPA to issue a SIP call under CAA section 110(k)(5).[319]

Finally, the EPA disagrees with the commenters on this specific point because it is not a logical construction of section 110(k)(5). The implication of the commenters' argument is that if a given area is in attainment, then the question of whether the SIP provisions meet applicable legal requirements is irrelevant. If a given area is not in attainment, then the implication of the commenter's argument is that the EPA must prove that the legally deficient SIP provision factually caused the violation of the NAAQS or else the legal deficiency is irrelevant. In the latter case, the logical extension of the commenter's argument is that no matter how deficient a SIP provision is to meet applicable legal requirements, the EPA is foreclosed from directing the state to correct that deficiency unless and until there is proof of a specific environmental harm caused, or specific enforcement case thwarted, by that deficiency. Such a reading is inconsistent with both the letter and the intent of section 110(k)(5).

2. Comments that the EPA must make specific factual findings to meet the

[312] *Id.*, 75 FR 77698 at 77705–07.

[313] *See, e.g.*, "Finding of Substantial Inadequacy of Implementation Plan; Call for California State Implementation Plan Revision," 68 FR 37746 (June 25, 2003) (SIP call to California for failure to meet legal requirements of section 110(a)(2)(C), section 110(a)(2)(I), and section 110(a)(2)(E) because of exemptions for agricultural sources from NNSR and PSD permitting requirements); "Credible Evidence Revisions," 62 FR 8314 at 8327 (February 24, 1997) (discussing SIP calls requiring states to revise their SIPs to meet CAA requirements with respect to the use of any credible evidence in enforcement actions for SIP violations).

[314] *See* "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision; Proposed rule," 76 FR 21639 (April 18, 2011).

[315] *Id.*, 76 FR 21639 at 21641. The EPA also found the first provision substantially inadequate because it operated to create an additional exemption for emissions during malfunctions that modified the existing emission limitations in some federal NSPS and NESHAP that the state had incorporated by reference into its SIP. The EPA's 1999 SSM Guidance had indicated that state SIP provisions could not validly alter NSPS or NESHAP.

[316] *Id.*

[317] *Id.*, 76 FR 21639 at 21643.

[318] 690 F.3d 1157 (10th Cir. 2012).

[319] *Id.* 690 F.3d at 1168.

refer exclusively to provisions that are literally found to cause a specific violation of the NAAQS. The EPA acknowledges that the legislative history quoted by the commenters discusses findings related to a failure of a SIP to attain the NAAQS, but the passage quoted does not explain the meaning of "new information" any more specifically than the statute, nor does the passage explain why the actual statutory text of section 110(a)(2)(H)(ii) now refers to findings related to failures to meet "any additional requirements" of the CAA.[322] Moreover, the commenters did not address the changes to the CAA in 1977 that added to the statutory language to refer to other requirements, nor did they address the changes to the CAA in 1990 that added section 110(k)(5), which refers to all other requirements of the CAA. The EPA believes that the more recent changes to the statute in fact support its view that section 110(a)(2)(H)(ii) entails compliance with the legal requirements of the CAA, not the narrow reading advocated by the commenters.

Fourth, the EPA disagrees with the commenters' arguments that it did not make factual "findings" to support this SIP call. To the contrary, the EPA has made numerous factual determinations with regard to the specific SIP provisions at issue. For example, for those SIP provisions that include automatic exemptions for emissions during SSM events, the EPA has found that the provisions are inconsistent with the definition of "emission limitation" in section 302(k) and that SIP provisions that allow sources to exceed otherwise applicable emission limitations during SSM events may interfere with attainment and maintenance of the NAAQS. The EPA has also made the factual determination that other SIP provisions that authorize director's discretion exemptions during SSM events are inconsistent with the statutory provisions applicable to the approval and revision of SIP provisions. The EPA has found that overbroad enforcement discretion provisions are inconsistent with the enforcement structure of the CAA in that they could be interpreted to allow the state to make the final decision whether such emissions are violations, thus impeding the ability of the EPA and citizens to enforce the emission limitations of the SIP. Similarly, the EPA has found, consistent with the court's decision in *NRDC* v. *EPA*, that affirmative defenses in SIP provisions are inconsistent with CAA requirements because they operate to alter or eliminate the jurisdiction of the courts to determine liability and impose penalties. In short, the EPA has made the factual findings that specific provisions are substantially inadequate to meet requirements of the CAA, as contemplated in both section 110(a)(2)(H)(ii) and section 110(k)(5).

Finally, the EPA notes that the cases cited by the commenters to support their contentions concerning the factual basis for agency decisions are not relevant to the specific question at hand. The correct question is whether section 110(a)(2)(H)(ii) requires the type of factual or technical analysis that they claim. None of the cases they cited address this specific issue. By contrast, the decision of the Tenth Circuit in *US Magnesium, LLC* v. *EPA* is much more relevant. In that decision, the court concluded that the EPA's authority under section 110(k)(5) is not restricted to situations where a deficient SIP provision caused a specific violation of the NAAQS and the exercise of that authority does not require specific factual findings that the provision caused such impacts.[323]

3. Comments that the EPA lacks authority to issue a SIP call because it is interpreting the term "substantial inadequacy" incorrectly.

Comment: Some commenters claimed that although the term "substantially inadequate" is not defined in the statute, the EPA made no effort to interpret the term. Citing *Qwest Corp.* v. *FCC*, 258 F.3d 1191, 1201–02 (10th Cir. 2001), the commenters argued that the EPA is not entitled to any deference to its interpretation of the term "substantial inadequacy."

Other commenters acknowledged that the EPA took the position that the term "substantially inadequate" is not defined in the CAA and that the Agency can establish an interpretation of that provision under *Chevron* step 2. However, these commenters disagreed that the EPA's interpretation of the term in the February 2013 proposal was reasonable. In particular, the commenters disagreed with the EPA's view that once a SIP provision is found to be "facially inconsistent" with a specific legal requirement of the CAA, nothing more is required to find the provision "substantially inadequate" to "comply with" that requirement. Commenters claimed that the EPA's interpretation conflicts with the statute because it ignores the statutory requirement that a SIP call be based on inadequacies that are "substantial" and that the interpretation does not meet the "high bar" Congress established before states could be required to undertake the difficult task of revising a SIP.

State commenters claimed that the requirement that the EPA must determine that the SIP is "substantially" inadequate establishes a heavy burden for the EPA. The commenters relied on a dictionary definition of "substantially" as meaning "considerable in importance, value, degree, amount, or extent." The commenters argued that when modifying the word "inadequate," the use of the modifier "substantially" in section 110(k)(5) enhances the degree of proof required. Thus, the commenters argued that the EPA cannot just assume that the provisions may prevent attainment of the NAAQS.

Other industry commenters disagreed that the term "substantially inadequate" is ambiguous but claimed that even if it were, the EPA's own interpretation is vague and ambiguous. The commenters asserted that the EPA's statement that it must evaluate the adequacy of specific SIP provision "in light of the specific purposes for which the SIP provision at issue is required" and with respect to whether the provision meets "fundamental legal requirements applicable to such a provision" is not a reasonable interpretation of the statutory language. Furthermore, the commenters argued, the EPA's interpretation of section 110(k)(5) to authorize a SIP call in the absence of any causal evidence that the SIP provision at issue causes a particular environmental impact reads out of the statute "the explicit requirement that a SIP call related to NAAQS be made only where the state plan is substantially inadequate to attain or maintain the relevant standard."

Response: The EPA disagrees with commenters who claimed that the Agency did not explain its interpretation of section 110(k)(5) in general, or the term "substantially inadequate" in particular, in the February 2013 proposal. To the contrary, the EPA provided an explanation of why it considers section 110(k)(5) to be ambiguous and provided a detailed explanation of how the Agency is interpreting and applying that statutory language to the specific SIP provisions at issue in this action.[324] Moreover, the EPA explained why it believes that the four major types of

[322] The EPA notes that the significance of this 1970 legislative history was raised in *US Magnesium, LLC* v. *EPA*, 690 F.3d 1157, 1166 (10th Cir. 2012). That court found the legislative history "inapposite" simply because it did not pertain to section 110(k)(5) which Congress added to the CAA in 1990. This legislative history passage is of limited significance in this action as well.

[323] *Id.*, 690 F.3d 1157, 1166.

[324] *See* February 2013 proposal, 78 FR 12459 at 12483–88.

specific nature of the SIP call in question for section 110(a)(2)(D)(i) did warrant a technical evaluation of whether the emissions from sources in particular states were significantly contributing to violations of a NAAQS in other states. Thus, the EPA elected to perform a specific form of analysis to determine whether emissions from sources in certain states significantly contributed to violations of the NAAQS in other states, and if so, what degree of reductions were necessary to remedy that interstate transport.

The nature of the SIP deficiencies at issue in this action does not require that type of technical analysis and does not require a "quantification" of the extent of the deficiency. In this action, the EPA is promulgating a SIP call action that directs the affected states to revise existing SIP provisions with specific legal deficiencies that make the provisions inconsistent with fundamental legal requirements of the CAA for SIPs, *e.g.*, automatic exemptions for emissions during SSM events or affirmative defense provisions that limit or eliminate the jurisdiction of courts to determine liability and impose remedies for violations. Accordingly, the EPA has determined that it is not necessary to establish that these deficiencies literally caused a specific violation of the NAAQS on a particular day or undermined a specific enforcement case. It is sufficient that the provisions fail to meet a legal requirement of the CAA and thus are substantially inadequate as provided in section 110(k)(5).

5. Comments that the EPA's interpretation of substantial inadequacy would override state discretion in development of SIP provisions.

Comment: Some state and industry commenters argued that the EPA's interpretation of its authority under section 110(k)(5) is wrong because it is inconsistent with the principle of cooperative federalism. These commenters asserted that the EPA's interpretation of the term "substantially inadequate," as explained in the February 2013 proposal, would allow the Agency to dictate that states revise their SIPs without any consideration of whether the states' preferred control measures affect attainment of the NAAQS, thereby expanding the EPA's role in CAA implementation. Consequently, these commenters concluded, the EPA's interpretation of section 110(k)(5) is neither "reasonable" nor "a permissible construction of the statute" under the principles of *Chevron* deference.[327]

Response: The EPA disagrees with the commenters' view of the cooperative-federalism relationship established in the CAA, as explained in detail in section V.D.2 of this document. Because the commenters are misconstruing the respective responsibility and authorities of the states and the EPA under cooperative federalism, the Agency does not agree that its interpretation of section 110(k)(5) is "unreasonable" for this reason under the principles of *Chevron*. As explained in detail in the February 2013 proposal, the EPA interprets its authority under section 110(k)(5) to include the ability to require states to revise their SIP provisions to correct the types of deficiencies at issue in this action.

Section 110(k)(5) explicitly authorizes the EPA to issue a SIP call for a broad range of reasons, including to address any SIP provisions that relate to attainment and maintenance of the NAAQS, to interstate transport, or to any other requirement of the CAA.[328] The EPA's authority and responsibility to review SIP submissions in the first instance is to assure that they meet all applicable procedural and substantive requirements of the CAA, in accordance with the requirements of sections 110(k)(3), 110(l) and 193. The EPA's authority and responsibility under the CAA includes assuring that SIP provisions comply with specific statutory requirements, such as the requirement that emission limitations apply to sources continuously. The CAA imposes these statutory requirements in order to assure that the larger objectives of SIPs are achieved, such as the attainment and maintenance of the NAAQS, protection of PSD increments, improvement of visibility and providing for effective enforcement. The CAA imposes this authority and responsibility upon the EPA when it first evaluates a SIP submission for approval. Likewise, after the initial approval, section 110(k)(5) authorizes the EPA to require states to revise their SIPs whenever the Agency later determines that to be necessary to meet CAA requirements. This does not in any way allow the EPA to interfere in the states' selection of the control measures they elect to impose to satisfy CAA requirements relating to NAAQS attainment and maintenance, provided that those selected measures comply with all CAA requirements such as the need for continuous emissions limitations. Accordingly, the EPA believes that its interpretation of section 110(k)(5) is fully consistent with the letter and the purpose of the principles of cooperative federalism.

6. Comments that the EPA cannot issue a SIP call for an existing SIP provision unless the provision was deficient at the time the state originally developed and submitted the provision for EPA approval.

Comment: Commenters argued that the EPA is using the SIP call to require states to change SIP provisions that were acceptable at the time they were originally approved and argued that section 110(k)(5) cannot be used for that purpose. Specifically, one commenter asserted that section 110(k)(5) provides that findings of substantial inadequacy shall "subject the State to the requirements of this chapter to which the State was subject *when it developed and submitted the plan for which such finding was made.*" (Emphasis added by commenter.) The implication of the commenters' argument is that a SIP provision only needs to meet the requirements of the CAA that were applicable at the time the state originally developed and submitted the provision for EPA approval. Because the EPA has no authority to issue a SIP call under their preferred reading of section 110(k)(5), the commenters claimed, the EPA would have to use its authority under section 110(k)(6) and would have to establish that the original approval of each of the provisions at issue in this action was in error.

Response: The EPA disagrees with this reading of section 110(k)(5). As an initial matter, the commenter takes the quoted excerpt of the statute out of context. The quoted language follows "to the extent the Administrator deems appropriate." Thus, it is clear when the statutory provision is read in full that the EPA has discretion in specifying the requirements to which the state is subject and is not limited to specifying only those requirements that applied at the time the SIP was originally "developed and submitted." Moreover, this cramped reading of section 110(k)(5) is not a reasonable interpretation of the statute because by this logic, the EPA could never require states to update grossly out-of-date SIP provisions so long as the provisions originally met CAA requirements. Given that the CAA creates a process by which

[327] *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

[328] *See, e.g., US Magnesium, LLC* v. *EPA*, 690 F.3d 1157, 1168 (10th Cir. 2012) (citing 42 U.S.C. 7410(k)(5)) (holding that the EPA may issue a SIP call not only based on NAAQS violations, but also whenever "EPA determines that a SIP is no longer consistent with the EPA's understanding of the CAA"); *id.* at 1170 (upholding the EPA's authority "to call a SIP in order to clarify language in the SIP that could be read to violate the CAA," even absent a pertinent judicial finding).

For example, section 302(k) does not differentiate between the legal requirements applicable to SIP emission limitations for an annual NAAQS versus for a 1-hour NAAQS, nor between any NAAQS based upon the statistical form of the respective standards. In addition to being supported by the text of section 302(k), the EPA's interpretation of the requirement for sources to be subject to continuous emission limitations is also the most logical given the consequences of the commenters' theory. The commenters' argument provides additional practical reasons to support the EPA's interpretation of the CAA to preclude exemptions for emissions during SSM events from SIP emission limitations as a basic legal requirement for all emission limitations.

The EPA agrees that to ascertain the specific ambient impacts of emissions during a given SSM event can sometimes be difficult. This difficulty can be exacerbated by factors such as exemptions in SIP provisions that not only excuse compliance with emission limitations but also affect reporting or recordkeeping related to emissions during SSM events. Determining specific impacts of emissions during SSM events can be further complicated by the fact that the limited monitoring network for the NAAQS in many states may make it more difficult to establish that a given SSM event at a given source caused a specific violation of the NAAQS. Even if a NAAQS violation is monitored, it may be the result of emissions from multiple sources, including multiple sources having an SSM event simultaneously. The different averaging periods and statistical forms of the NAAQS may make it yet more difficult to determine the impacts of specific SSM events at specific sources, perhaps until years after the event occurred. By the commenters' own logic, there could be situations in which it is functionally impossible to demonstrate definitively that emissions during a given SSM event at a single source caused a specific violation of a specific NAAQS.

The commenters' argument, taken to its logical extension, could result in situations where a SIP emission limitation is only required to be continuous for purposes of one NAAQS but not for another, based on considerations such as averaging time or statistical form of the NAAQS. Such situations could include illogical outcomes such as the same emission limitation applicable to the same source simultaneously being allowed to contain exemptions for emissions during SSM events for one NAAQS but not for another. For example, purely hypothetically under the commenters' premise, a given source could simultaneously be required to comply with a rate-based NO_X emission limitation continuously for purposes of a 1-hour NO_2 NAAQS but not be required to do so for purposes of an annual NO_2 NAAQS, or the source could be required to comply continuously with the same NOx limitation for purposes of the 8-hour ozone NAAQS and the 24-hour $PM_{2.5}$ NAAQS but not be required to do so for purposes of the annual $PM_{2.5}$ NAAQS. Add to this the further complication that the source may be located in an area that is designated nonattainment for some NAAQS and attainment for other NAAQS, and thus subject to emission limitations for attainment and maintenance requirements simultaneously.

Under the commenters' premise, the same SIP emission limitation, subject to the same statutory definition in section 302(k), could validly include SSM exemptions for purposes of some NAAQS but not others. Such a system of regulation would make it unnecessarily hard for regulated entities, regulators and other parties to determine whether a source is in compliance. The EPA does not believe that this is a reasonable interpretation of the requirements of the CAA, nor of its authority under section 110(k)(5). This unnecessary confusion is easily resolved simply by interpreting the CAA to require that a source subject to a SIP emission limitation for NO_X must meet the emission limitation continuously, in accordance with the express requirement of section 302(k), thus making SSM exemptions impermissible. The EPA does not agree that the term "emission limitation" can reasonably be interpreted to allow noncontinuous emission limitations for some NAAQS and not others. The D.C. Circuit has already made clear that the term "emission limitation" means limits that apply to sources continuously, without exemptions for SSM events.

Finally, the EPA disagrees with the specific arguments raised by commenters concerning the modeling guidance for the 1-hour NO_2 NAAQS.[330] As relevant here, that guidance provides recommendations about specific issues that arise in modeling that is used in the PSD program for purposes of demonstrating that proposed construction will not cause or contribute to a violation of the 1-hour NO_2 NAAQS. Thus, as an initial matter, the EPA notes that the context of that guidance relates to determining the extent of emission reductions that a source needs to achieve in order to obtain a permit under the PSD program, which is distinct from the question of whether an emission limitation in a permit must assure continuous emission reductions.

The commenters argued that this EPA guidance "allows sources to completely exclude all emissions during startup and shutdown scenarios." This characterization is inaccurate for a number of reasons. First, the guidance in question is only intended to address certain modeling issues related to predictive modeling to demonstrate that proposed construction will not cause or contribute to violation of the 1-hour NO_2 NAAQS, for purposes of determining whether a PSD permit may be issued and whether the emission limitations in the permit will require sufficient emission reductions to avoid a violation of this standard.

Second, to the extent that the guidance indicates that air quality considerations might in certain circumstances and for certain purposes be relevant to determining what emission limitations should apply to a source, that does not mean a source may legally have an exemption from compliance with existing emissions limitations during SSM events. In the guidance cited by the commenter, the EPA did recommend that under certain circumstances, it may be appropriate to model the projected impact of the source on the NAAQS without taking into account "intermittent" emissions from sources such as emergency generators or emissions from particular kinds of "startup/shutdown" operations.[331] However, the EPA did not intend this to suggest that emissions from sources during SSM events may validly be treated as exempt in SIP emission limitations. Within the same guidance document, the EPA stated unequivocally that the guidance "has no effect on or relevance to existing policies and guidance regarding excess emissions that may occur during startup and shutdown." The EPA explained further that "all emissions from a new or modified source are subject to the applicable permitted emission limits and may be subject to enforcement concerning such excess emissions, regardless of whether a portion of those emissions are not included in the modeling demonstration based on the

[330] *See* Memorandum, "Additional Clarification Regarding Application of Appendix W Modeling Guidance for the 1-hour NO_2 National Ambient Air Quality Standard," from T. Fox, EPA/OAQPS, to Regional Air Division Directors, March 1, 2011.

[331] *Id.* at 2.

Response: The EPA disagrees that it lacks authority to issue this SIP call on the grounds claimed by the commenters. As explained in detail in the February 2013 proposal and in this final action, the EPA has long interpreted the CAA to preclude SSM exemptions in SIP provisions. This interpretation has been stated by the EPA since at least 1982, reiterated in subsequent SSM Policy guidance documents, applied in a number of notice and comment rulemakings and upheld by courts.

With respect to the arguments that the EPA has incorrectly interpreted the terms "emission limitation" and "continuous" in this action, the EPA has responded in detail in section VII.A.3 of this document and need not repeat those responses here. In short, the EPA is interpreting those terms consistent with the relevant statutory language and consistent with the decision of the court in *Sierra Club* v. *Johnson*. Because the specific SIP provisions identified in this action with automatic or discretionary exemptions for emissions during SSM events do not limit emissions from the affected sources continuously, the EPA has found these provisions substantially inadequate to meet CAA requirements in accordance with section 110(k)(5).

11. Comments that section 110(k)(5) imposes a "higher burden of proof" upon the EPA than section 110(l) and that section 110(l) requires the EPA to conduct a specific technical analysis of the impacts of a SIP revision.

Comment: Commenters argued that the EPA is misinterpreting section 110(k)(5) to authorize a SIP call using a lower "standard" than the section 110(l) "standard" that requires disapproval of a new SIP provision in the first instance. The commenters stated that section 110(k)(5) requires a determination by the EPA that a SIP provision is "substantially inadequate" to meet CAA requirements in order to authorize a SIP call, whereas section 110(l) provides that the EPA must disapprove a SIP revision provision only if it "would interfere with" CAA requirements. Thus, the commenters asserted that "the SIP call standard is higher than the SIP revision standard." The commenters further argued that it would be "illogical and contrary to the CAA to interpret section 110 to establish a lower standard for calling a previously approved SIP and demanding revisions to it than for disapproving that SIP in the first place." For purposes of section 110(l), the commenters claimed, the EPA "is required" to rely on specific "data and evidence" that a given SIP revision would interfere with CAA requirements and this requirement is thus imposed by section 110(k)(5) as well. In support of this reasoning, the commenters relied on prior court decisions pertaining to the requirements of section 110(l).

Response: The EPA disagrees with the commenters' interpretations of the relative "standards" of section 110(k)(5) and section 110(l) and with the commenters' views on the court decisions pertaining to section 110(l). In addition, the EPA notes that the commenters did not fully address the related requirements of section 110(k)(3) concerning approval and disapproval of SIP provisions, of section 302(k) concerning requirements for emission limitations or of any other sections of the CAA that are substantively germane to specific SIP provisions and to enforcement of SIP provisions in general.[336]

The commenters argued that, by the "plain language" of the CAA and because of "common sense," Congress intended the section 110(k)(5) SIP call standard to be "higher" than the section 110(l) SIP revision. The EPA disagrees that this is a question resolved by the "plain language." To the contrary, the three most relevant statutory provisions, section 110(k)(3), section 110(l), and section 110(k)(5), are each to some degree ambiguous and are likewise ambiguous with respect to how they operate together to apply to newly submitted SIP provisions versus existing SIP provisions. Section 110(k)(3) requires the EPA to approve a newly submitted SIP provision "if it meets all of the applicable requirements of [the CAA]." Implicitly, the EPA is required to disapprove a SIP provision if it does not meet all applicable CAA requirements. Section 110(l) provides that the EPA may not approve any SIP revision that "would interfere with . . . any other applicable requirement of [the CAA]." Section 110(k)(5) provides that the EPA shall issue a SIP call "whenever" the Agency finds an existing SIP provision "substantially inadequate . . . to otherwise comply with [the CAA]." None of the core terms in each of the three provisions is defined in the CAA. Thus, whether the "would interfere with" standard of section 110(l) is *per se* a "lower" standard than the "substantially inadequate" standard of section 110(k)(5) as advocated by the commenters is not clear on the face of the statute, and thus the EPA considers these terms ambiguous.

As explained in detail in the February 2013 proposal, the EPA interprets its authority under section 110(k)(5) broadly to include authority to require a state to revise an existing SIP provision that fails to meet fundamental legal requirements of the CAA.[337] The commenters raise a valid point that section 110(l) and section 110(k)(5), as well as section 110(k)(3), facially appear to impose somewhat different standards. However, the EPA does not agree that the proper comparison is necessarily between section 110(k)(5) and section 110(l) but instead would compare section 110(k)(5) and section 110(k)(3). Section 110(l) is primarily an "anti-backsliding" provision, meant to assure that if a state seeks to revise its SIP to change *existing* SIP provisions that the EPA has previously determined *did meet* CAA requirements, then there must be a showing that the revision of the existing SIP provisions (*e.g.*, a relaxation of an emission limitation) would not interfere with attainment of the NAAQS, reasonable further progress or any other requirement of the CAA. By contrast, section 110(k)(3) is a more appropriate point of comparison because it directs the EPA to approve a SIP provision "that meets all applicable requirements" of the CAA and section 110(k)(5) authorizes the EPA to issue a SIP call for previously approved SIP provisions that it later determines do not "comply with any requirement" of the CAA.

Notwithstanding that each of these three statutory provisions applies to different stages of the SIP process, all three of them explicitly make compliance with the legal requirements of the CAA a part of the analysis. At a minimum, the EPA believes that Congress intended these three sections, working together, to ensure that SIP provisions must meet all applicable legal CAA requirements when they are initially approved and to ensure that SIP provisions continue to meet CAA requirements over time, allowing for potential amendments to the CAA, changes in interpretation of the CAA by the EPA or courts or simply changed facts. With respect to compliance with the applicable legal requirements of the

[336] CAA section 110(k)(5) states that "[w]henever the [EPA] finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant [NAAQS], to mitigate adequately [ ] interstate pollutant transport . . ., or to otherwise comply with any requirement of [the CAA], the [EPA] shall require the State to revise the plan as necessary to correct such inadequacies." Section 110(l) states that, in the event a state submits a SIP revision, the EPA "shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress . . . or any other applicable requirement of [the CAA]." Section 110(k)(3) states that the EPA "shall approve such submittal . . . if it meets all the requirements of [the CAA]."

[337] *See* February 2013 proposal, 78 FR 12459 at 12483–88.

"seeking revision of the SIP was prudent, not arbitrary or capricious." [344]

Fourth, the court explicitly upheld the EPA's reasonable interpretation of section 110(k)(5) to authorize a SIP call when a state's SIP provision is substantially inadequate to meet applicable legal requirements, without making "specific factual findings" that the deficient provision resulted in a NAAQS violation. The EPA interpreted the CAA to allow a SIP call if the Agency "determined that aspects of the SIP undermine the fundamental integrity of the CAA's SIP process and structure, regardless of whether or not the EPA could point to specific instances where the SIP allowed violations of the NAAQS." The *US Magnesium* court explicitly agreed that section 110(k)(5) authorizes issuance of a SIP call "where the EPA determines that a SIP is no longer consistent with the EPA's understanding of the CAA." [345]

Fifth, the court rejected claims that the EPA was requiring states to comply with the SSM Policy guidance rather than the CAA requirements, and the court noted that the Agency had undertaken notice-and-comment rulemaking to evaluate whether the SIP provisions at issue were consistent with CAA requirements.[346]

Sixth, the court rejected the claim that the EPA was interpreting the requirements of the CAA incorrectly because the EPA is in the process of bringing its own NSPS and NESHAP regulations into line with CAA requirements for emission limitations, in accordance with the *Sierra Club* v. *Johnson* decision.[347] The court noted that the EPA is now correcting SSM exemptions in its own regulations, and thus its prior interpretation of the CAA, rejected by the court in *Sierra Club* v. *Johnson,* did not make the SIP call to Utah arbitrary and capricious.[348]

On these and many other issues, the EPA believes that the court's decision in *US Magnesium* provides an important and correct precedent for the Agency's interpretation of the CAA in this action. The commenters' apparent disagreement with the court does not mean that the decision is not relevant to this action. The commenters specifically argued that the *US Magnesium* court did not reach the issue of whether the EPA had "defined" the term "substantial inadequacy" in the challenged rulemaking because the petitioner had not raised this point in comments. The EPA does not necessarily agree that "defining" the full contours of the term is a necessary step for a SIP call, but regardless of that fact the Agency did explain its interpretation of the term "substantial inadequacy" with respect to the SIP provisions at issue in the February 2013 proposal, the SNPR and this final action.

13. Comments that EPA has to evaluate a SIP "as a whole" to have the authority to issue a SIP call.

Comment: Many state and industry commenters argued that the EPA cannot evaluate individual SIP provisions in isolation and that the Agency is required to evaluate the entire SIP and any related permit requirements in order to determine if a specific SIP provision is substantially inadequate. In particular, some commenters argued that the EPA was wrong to focus upon the exemptions in SIP emission limitations for emissions during SSM events without considering whether some other requirement of the SIP or of a permit might operate to override or otherwise modify the exemptions. Many of the commenters asserted that other "general duty" clause requirements, elsewhere in other SIP provisions or in permits for individual sources, make the SSM exemptions in SIP emission limitations valid under the CAA.[349] These other requirements were often general duty-type standards that require sources to minimize emissions, to exercise good engineering judgment or not to cause a violation of the NAAQS. The implication of the commenters' arguments is that such general-duty requirements legitimize an SSM exemption in a SIP emission limitation—even if they are not explicitly a component of the SIP provision, if they are not incorporated by reference in the SIP provision and if they are not adequate to meet the applicable substantive requirements for that type of SIP provision.

Response: The EPA disagrees with the basic premise of the commenters that the EPA cannot issue a SIP call directing a state to correct a facially deficient SIP provision without first determining whether an unrelated and not cross-referenced provision of the SIP or of a permit might potentially apply in such a way as to correct the deficiency. As explained in section VII.A.3 of this document, the EPA believes that all SIP provisions must meet applicable requirements of the CAA, including the requirement that they apply continuously to affected sources. In reviewing the specific SIP provisions identified in the Petition, the EPA determined that many of the provisions include explicit automatic or discretionary exemptions for emissions during SSM events, whether as a component of an emission limitation or as a provision that operates to override the otherwise applicable emission limitation. Based on the EPA's review of these provisions, neither did they apply "continuously" as required by section 302(k) nor did they include cross-references to any other limitations that applied during such exempt periods to potentially provide continuous limitations. To the extent that the SIP of a state contained any other requirements that applied during such periods, that fact was not plain on the face of the SIP provision. If the EPA was unable to ascertain what, if anything, applied during these explicitly exempt periods, then the Agency concludes that regulated entities, members of and the public, and the courts will have the same problem. The EPA has authority under section 110(k)(5) to issue a SIP call requiring a state to clarify a SIP provision that is ambiguous or unclear such that the provision can lead to misunderstanding and thereby interfere with effective enforcement.[350]

To the extent that an affected state believes that the EPA has overlooked another valid provision of the SIP that would cure the substantial inadequacy that the Agency has identified in this action, the state may seek to correct the deficient SIP provision by properly revising it to remove the impermissible exemption or affirmative defense and replacing it with the requirements of the other SIP provision or by including a clear cross-reference that clarifies the applicability of such provision as a component of the specific emission limitation at issue. The state should make this revision in such a way that the SIP emission limitation is clear on its face as to what the affected sources are required to do during all modes of operation. The emission limitation should apply continuously, and what is required by the emission limitation under any mode of operation should be

[344] *Id.*, 690 F.3d at 1170.
[345] *Id.*, 690 F.3d at 1168.
[346] *Id.*, 690 F.3d at 1168.
[347] *Id.*, 690 F.3d at 1169.
[348] *Id.*, 690 F.3d at 1170.

[349] The EPA notes that other commenters on the February 2013 proposal made similar arguments with respect to affirmative defense provisions in their SIPs, asserting that other SIP provisions or terms in permits provided additional criteria that would have made the affirmative defense provisions at issue consistent with the EPA's interpretation of the CAA in the 1999 SSM Guidance. *See, e.g.,* Comment from Virginia Department of Environmental Quality at 1–2, in the rulemaking docket at EPA–HQ–OAR–2012–0322–0613. Because the EPA no longer interprets the CAA to allow any affirmative defense provisions, these comments are not germane.

[350] *See US Magnesium, LLC* v. *EPA,* 690 F.3d 1157, 1169 (10th Cir. 2012).

interpretation because these requirements remain applicable after an area is redesignated to attainment. For at least the past 15 years, the EPA has applied this interpretation with respect to requirements to which a state will continue to be subject after the area is redesignated.[353] Courts reviewing the EPA's interpretation of the term "applicable" in section 107(d)(3) in the context of requirements applicable for redesignation have generally agreed with the Agency.[354]

The EPA therefore approves redesignation requests in many instances without passing judgment on every part of a state's existing SIP, if it finds those parts of the SIP are not "applicable" for purposes of section 107(d)(3). For example, the EPA recently approved Arizona's request to redesignate the Phoenix-Mesa 1997 8-hour ozone nonattainment area and its accompanying maintenance plan, while recognizing that Arizona's SIP may contain affirmative defense provisions that are not consistent with CAA requirements.[355] In that case, the EPA explicitly noted that approval of the redesignation of the Phoenix-Mesa nonattainment area did not relieve Arizona or Maricopa County of its obligation to remove the affirmative defense provisions from the SIP, if the EPA was to take later action to require correction of the Arizona SIP with respect to those provisions.[356]

The EPA also disagrees with commenters to the extent they suggest that the Agency must use the redesignation process to evaluate whether any existing SIP provisions are legally deficient. The EPA has other statutory mechanisms through which to address existing deficiencies in a state's SIP, and courts have agreed that the EPA retains the authority to issue a SIP call to a state pursuant to CAA section 110(k)(5) even after redesignation of a nonattainment area in that state.[357] The EPA recently addressed this issue in the context of redesignating the Ohio portion of the Huntington-Ashland (OH–WV–KY) nonattainment area to attainment for the $PM_{2.5}$ NAAQS.[358] In response to comments challenging the proposed redesignation due to the presence of certain SSM provisions in the Ohio SIP, the EPA concluded that the provisions at issue did not provide a basis for disapproving the redesignation request.[359] In so concluding, the EPA noted that the SSM provisions and related SIP limitations at issue in that state were already approved into the SIP and thus "permanent and enforceable" for the purposes of meeting section 107(d)(3)(E)(iii) and that the Agency has other statutory mechanisms for addressing any problems associated with the SSM provisions.[360] The EPA emphasizes that the redesignation of areas to attainment does not relieve states of the responsibility to remove legally deficient SIP provisions either independently or pursuant to a SIP call. To the contrary, the EPA maintains that it may determine that deficient provisions such as exemptions or affirmative defense provisions applicable to SSM events are contrary to CAA requirements and take action to require correction of those provisions even after an area is redesignated to attainment for a specific NAAQS. This interpretation is consistent with prior redesignation actions.

In some cases, the EPA has stated that the presence of illegal SSM provisions does constitute grounds for denying a redesignation request. For example, the EPA issued a proposed disapproval of Utah's redesignation requests for Salt Lake County, Utah County and Ogden City PM_{10} nonattainment areas.[361] However, the specific basis for the proposed disapproval in that action, which was one of many SIP deficiencies identified by EPA, was the state's inclusion in the submission of new provisions not previously in the SIP that would have provided blanket exemptions from compliance with emission standards during SSM events. Those SSM exemptions were not in the previously approved SIP, and the EPA declined to approve them in connection with the redesignation request because such provisions are inconsistent with CAA requirements. In most redesignation actions, states have not sought to create new SIP provisions that are inconsistent with CAA requirements as part of their redesignation requests or maintenance plans.

Finally, the EPA disagrees with commenters that approval of a maintenance plan for any area has the result of precluding the Agency from later finding that certain SIP provisions are substantially inadequate under the CAA on the basis that those provisions may interfere with attainment or maintenance of the NAAQS or fail to meet any other legal requirement of the CAA. The approval of a state's redesignation request and maintenance plan for a particular NAAQS is not the conclusion of the state's and the EPA's responsibilities under the CAA but rather is one step in the process Congress established for identifying and addressing the nation's air quality problems on a continuing basis. The redesignation process allows states with nonattainment areas that have attained the relevant NAAQS to provide the EPA with a demonstration of the control measures that will keep the area in attainment for 10 years, with the caveat that the suite of measures may be revisited if necessary and must be revisited with a second maintenance plan for the 10 years following the initial 10-year maintenance period.

Moreover, it is clear from the structure of section 175A maintenance plans that Congress understood that the EPA's approval of a maintenance plan is not a guarantee of future attainment air quality in a nonattainment area. Rather, Congress foresaw that violations of the NAAQS could occur following a redesignation of an area to attainment and therefore required section 175A maintenance plans to include contingency measures that a state could implement quickly in response to a violation of a standard. The notion that the EPA's approval of a maintenance plan must be the last word with regard to the contents of a state's SIP simply does not comport with the framework Congress established in the CAA for redesignations. The EPA has continuing authority and responsibility to assure that a state's SIP meets CAA

Redesignation of the Phoenix-Mesa Nonattainment Area to Attainment for the 1997 8-Hour Ozone Standard; Proposed rule," 79 FR 16734 at 16739 n.22 (March 26, 2014).

[353] *See, e.g.*, 73 FR 22307 at 22312–13 (April 25, 2008) (proposed redesignation of San Joaquin Valley; the EPA concluded that section 110(a)(2)(D) transport requirements are not applicable under section 110(d)(3)(E)(v) because they "continue to apply to a state regardless of the designation of any one particular area in the state"); 62 FR 24826 at 24829–30 (May 7, 1997) (redesignation of Reading, Pennsylvania, Area; the EPA concluded that the additional controls required by section 184 were not "applicable" for purposes of section 107(d)(3)(E) because "they remain in force regardless of the area's redesignation status").

[354] *See Sierra Club* v. *EPA*, 375 F.3d 537 (7th Cir. 2004); *Wall* v. *EPA*, 265 F.3d 426, 438 (6th Cir. 2001). *But see Sierra Club* v. *EPA*, Nos. 12–3169, 12–3182, 12–3420 (6th Cir. Mar. 18, 2015), *petition for reh'g en banc filed.*

[355] 79 FR 55645 (September 17, 2014).

[356] *Id.* at 55648. The EPA notes that it has included the deficient SIP provisions that include the affirmative defenses in this action, thereby illustrating that it can take action to address a SIP deficiency separately from the redesignation action, where appropriate.

[357] *See Southwestern Pennsylvania Growth Alliance* v. *EPA*, 114 F.3d 984 (6th Cir. 1998) (Redesignation of Cleveland-Akron-Lorain area determined valid even though the Agency subsequently proposed a SIP call to require Ohio and other states to revise their SIPs to mitigate ozone transport to other states).

[358] *See* 77 FR 76883 (December 31, 2012).

[359] *Id.* at 76891–92.

[360] The EPA notes that the provisions at issue in the redesignation action are included in this SIP call, thus illustrating that the Agency can address these deficient provisions in a context other than a redesignation request.

[361] 74 FR 62717 (December 1, 2009).

action regarding such emissions. Also, even if historically such excess emissions have not caused or contributed to an exceedance or violation, this would not mean that they could not do so at some time in the future. Finally, given that there are many locations where air quality is not monitored such that a NAAQS exceedance or violation could be observed, the inability to demonstrate that such excess emissions have not caused or contributed to an exceedance or violation would not be proof that they have not. Thus, the EPA has long held that exemptions from emission limitations for emissions during SSM events are not consistent with CAA requirements, including the obligation to attain and maintain the NAAQS and the requirement to ensure adequate enforcement authority.

Despite claims by the commenter to the contrary, the EPA has not mandated the specific means by which states should regulate emissions from sources during startup and shutdown events. Requiring states to ensure that periods of startup and shutdown are regulated consistent with CAA requirements is not tantamount to prescribing the specific means of control that the state must adopt. By the SIP call, the EPA has simply explained the statutory boundaries to the states for SIP provisions, and the next step is for the states to revise their SIPs consistent with those boundaries. States remain free to choose the "mix of controls," so long as the resulting SIP revisions meet CAA requirements. The EPA agrees with the commenter who notes several options available to the states in responding to the SIP call. The commenter stated that there are various options available to states, such as "adopting alternative numeric emission limitations, work practice standards, additional operational limitations, or revising existing numeric emission limitations and/or their associated averaging times to create a sufficient compliance margin for unavoidable SSM emissions." However, the state must demonstrate how that mix of controls for all periods of operation will ensure attainment and maintenance of the NAAQS or meet other required goals of the CAA relevant to the SIP provision, such as visibility protection. For example, if a state chooses to modify averaging times in an emission limitation to account for higher emissions during startup and shutdown, the state would need to consider and demonstrate to the EPA how the variability of emissions over that averaging period might affect attainment and maintenance of a NAAQS with a short averaging period (*e.g.*, how a 30-day averaging period for emissions can ensure attainment of an 8-hour NAAQS). One option noted by the commenter, "justifying existing provisions," does not seem promising, based on the evaluation that the EPA has performed as a basis for this SIP call action. If by justification, the commenter simply means that the state may seek to justify continuing to have an exemption for emissions during SSM events, the EPA has already determined that this is impermissible under CAA requirements.

The EPA regrets any confusion that may have resulted from its discussion in the preamble to the February 2013 proposal. The EPA's statement that startup and shutdown emissions above otherwise applicable limitations must be considered a violation is simply another way of stating that states cannot exempt sources from complying with emissions standards during periods of startup and shutdown. This is not inconsistent with the EPA's statement that states can develop alternative requirements for periods of startup and shutdown where emission limitations that apply during steady-state operations could not be feasibly met. In such a case, startup and shutdown emissions would not be exempt from compliance but rather would be subject to a different, but enforceable, standard. Then, only emissions that exceed such alternative emission limitations would constitute violations.

17. Comments that because areas are in attainment of the NAAQS, SIP provisions such as automatic exemptions for excess emissions during SSM events are rendered valid under the CAA.

Comment: Commenters argued that SSM exemptions should be permissible in SIP provisions applicable to areas designated attainment because, they asserted, there is evidence that the exemptions do not result in emissions that cause violations of the NAAQS. To support this contention, the commenters observed that a number of states with SSM exemptions in SIP provisions at issue in this SIP call are currently designated attainment in all areas for one or all NAAQS and also that some of these states had areas that previously were designated nonattainment for a NAAQS but subsequently have come into attainment. Thus, the commenters asserted, the SIP provisions that the EPA identified as deficient due to SSM exemptions must instead be consistent with CAA requirements because these states are in attainment. The commenters claimed that because these areas have shown they are able to attain and maintain the NAAQS or to achieve emission reductions, despite SSM exemptions in their SIP provisions, the EPA's concerns with respect to SSM exemptions are unsupported and unwarranted. Based on the premise that SSM exemptions are not inconsistent with CAA requirements applicable to areas that are attaining the NAAQS, the commenters claimed that such provisions cannot be substantially inadequate to meet CAA requirements.

Response: The EPA disagrees with the commenters' view that, so long as the provisions apply in areas designated attainment, the CAA allows SIP provisions with exemptions for emissions during SSM events. The commenters based their argument on the incorrect premise that SIP provisions applicable to sources located in attainment areas do not also have to meet fundamental CAA requirements such as sections 110(a)(2)(A), 110(a)(2)(C) and 302(k). Evidently, the commenters were only thinking narrowly of the statutory requirements applicable to SIP provisions in SIPs for purposes of part D attainment plans, which are by design intended to address emissions from sources located in nonattainment areas and to achieve attainment of the NAAQS in such areas. The EPA does not interpret the fundamental statutory requirements applicable to SIP provisions (*e.g.*, that they impose continuous emission limitations) to apply exclusively in nonattainment areas; these requirements are relevant to SIP provisions in general.

The statutory requirements applicable to SIPs are not limited to areas designated nonattainment. To the contrary, section 107(a) imposes the responsibility on each state to attain and maintain the NAAQS "within the entire geographic areas comprising such State." The requirement to maintain the NAAQS in section 107(a) clearly applies to areas that are designated attainment, including those that may previously have been designated nonattainment. Similarly, section 110(a)(1) explicitly requires states to have SIPs with provisions that provide for the implementation, maintenance and enforcement of the NAAQS. By inclusion of "maintenance," section 110(a)(1) clearly encompasses areas designated attainment as well as nonattainment. The SIPs that states develop must also meet a number of more specific requirements set forth in section 110(a)(2) and other sections of the CAA relevant to particular air quality issues (*e.g.*, the requirements for attainment plans for the different NAAQS set out in more detail in part D). Among those basic requirements that

of the original deficient SIP provision in some way negates the original deficiency. The industry commenter pointed to "dozens of instances where EPA reviewed Alabama SIP revision submittals" as times when the EPA should have addressed any SSM-related deficient SIP provisions. However, the EPA's approval of other SIP revisions does not necessarily entail reexamination and reapproval of every provision in the SIP. The EPA often only examines the specific provision the state seeks to revise in the SIP submission without reexamining all other provisions in the SIP. The EPA sometimes broadens its review if commenters bring other concerns to the Agency's attention during the rulemaking process that are relevant to the SIP submission under evaluation.

19. Comments that exemptions for excess emissions during exempt SSM events would not distort emissions inventories, SIP control measure development or modeling, because the EPA's regulations and guidance concerning "rule effectiveness" adequately account for these emissions, and therefore the proposed SIP calls are not needed or justified.

Comment: One commenter argued that provisions allowing exemptions or affirmative defenses for excess emissions during startup and shutdown are consistent with a state's authority under CAA section 110 and that this is evidenced by the fact that the EPA has issued guidance on "rule effectiveness" that plainly takes into account a "discount" factor in a state's demonstration of attainment when it chooses to adopt startup/shutdown provisions. This commenter cited the EPA's definition of "rule effectiveness" at 40 CFR 51.50 and EPA guidance on demonstrating attainment of $PM_{2.5}$ and regional haze air quality goals.[367]

Response: The EPA disagrees with the characterization in this comment of past EPA guidance and with the conclusion that the fact of the existence of EPA guidance on "rule effectiveness" would support the claim that the CAA provides authority for exemptions or affirmative defenses for excess emissions during startup and shutdown. The EPA's definition of "rule effectiveness" at 40 CFR 51.50 does not refer to startup and shutdown; it refers only to "downtime, upsets, decreases in control efficiencies, and other deficiencies in emission estimates," and once defined the term "rule effectiveness" is not subsequently used within 40 CFR part 51 in any way that would indicate that it is meant to capture the effect of exemptions during startup and shutdown. The EPA guidance on demonstrating attainment of $PM_{2.5}$ and regional haze goals cited by the commenter also does not address rule effectiveness or excess emissions during startup and shutdown. The terms "startup" and "shutdown" do not appear in the attainment demonstration guidance. The EPA did issue a different guidance document in 1992 on rule effectiveness,[368] but that document focused only on the preparation of emissions inventories for 1990, not on demonstrating attainment of NAAQS or regional haze goals. Moreover, the 1992 guidance document addressed ways of estimating actual 1990 emissions in light of the likelihood of a degree of source noncompliance with applicable emission limitations, not on the emissions that would be permissible in light of the absence of a continuous emission limitation applicable during startup and shutdown. The terms "startup" and "shutdown" do not appear in the 1992 guidance. In 2005, the EPA replaced the 1992 guidance document on rule effectiveness as part of providing guidance for the implementation of the 1997 ozone and $PM_{2.5}$ NAAQS.[369] Like the 1992 guidance, the 2005 guidance associated "rule effectiveness" with the issue of noncompliance and did not provide any specific advice on quantifying emissions that could be legally emitted because of SSM exemptions in SIPs. To avoid misunderstanding, the 2005 guidance included a question and answer on startup and shutdown emissions to the effect that emissions during startup and shutdown should be included in "actual emissions." This question and answer included the statement, "[L]ess preferably, [emissions during startup, shutdown, upsets and malfunctions] can be accounted for using the rule effectiveness adjustment procedures outlined in this guidance." However, other than in this question and answer, the 2005 guidance does not mention emissions during startup and shutdown events; it focuses on issues of noncompliance with applicable emission limitations. The fact that the 1992 guidance document did not intend for "rule effectiveness" to encompass SIP-exempted emissions during startup and shutdown, and that the 2005 guidance also did not, is confirmed by a statement in a more recent draft EPA guidance document:

> In addition to estimating the actual emissions during startup/shutdown periods, another approach to estimate startup/shutdown emissions is to adjust control parameters via the emissions calculation parameters of rule effectiveness or primary capture efficiency. *Using these parameters for startup/shutdown adjustments is not their original purpose,* but can be a simple way to increase the emissions and still have a record of the routine versus startup/shutdown portions of the emissions. (Emphasis added.)[370]

Furthermore, as explained in the proposals for this action and in this document, the EPA believes that it is a fundamental requirement of the CAA that SIP emission limitations be continuous, which therefore precludes exemptions for excess emissions during startup and shutdown. At bottom, although it is true that these guidance documents indicated that one less preferable way to account for startup and shutdown emissions could be through the rule effectiveness analysis, this does not in any way indicate that exemptions from emissions limitations would be appropriate for such periods.

Comment: A commenter argued that the EPA has not shown any substantial inadequacy with respect to CAA requirements but that the closest the EPA comes to identifying a substantial inadequacy is in the EPA's discussion of its concern regarding the impacts of SSM exemptions on the development of accurate emissions inventories for air quality modeling and other SIP planning. This commenter and another commenter in particular noted a passage in the February 2013 proposal that stated that emission limitations in SIPs are used to meet various requirements for attainment and maintenance of the NAAQS and that all of these uses typically assume continuous source compliance with emission limitations.[371] These commenters disagreed with the EPA's statement that all of these uses typically assume continuous source compliance with

[367] The commenter appears to have been meaning to cite to the draft EPA guidance document "Draft Guidance for Demonstrating Attainment of Air Quality Goals for $PM_{2.5}$ and Regional Haze," January 2, 2001. This draft guidance on $PM_{2.5}$ and Regional Haze was combined with similar guidance on ozone in the final guidance document "Guidance on the Use of Models and Other Analyses for Demonstrating Attainment of Air Quality Goals for Ozone, $PM_{2.5}$, and Regional Haze," April 2007, EPA–454/B–07–002.

[368] "Guidelines for Estimating and Applying Rule Effectiveness for Ozone/CO State Implementation Plan Base Year Inventories," November 1992, EPA–4S2JR–92.010.

[369] "Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations," Appendix B, August 2005, EPA–454/R–05–001.

[370] "Draft Emissions Inventory Guidance for Implementation of Ozone [and Particulate Matter]* National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations," April 11, 2014, page 62.

[371] February 2013 proposal, 78 FR 12459 at 12485.

from annual emissions during other type of operation, to segregate the emissions is not a requirement and few states do so. Moreover, the EPA's emissions inventory rules require reporting on most sources only on an "every third year" basis, which means that unless an air agency has authority to and does require more information from sources than is needed to meet the air agency's reporting obligation to the EPA, the air agency will not be in a position to know whether and how, between the triennial inventory reports, excess emissions during startup and shutdown may be changing due to variations in source operation and possibly affecting attainment or maintenance. Thus, the EPA's emissions inventory rules provide air agencies only limited leverage in terms of ability to obtain detailed information from sources regarding the extent to which actual emissions during SSM events may be unreported in emissions inventories, due to SIP exemptions. The EPA believes that when exemptions for excess emissions during SSM events are removed from SIPs, thereby making high emissions during SSM events specifically reportable deviations from emission limitations for more sources than now report them as such, it will be easier for air agencies to understand the timing and magnitude of event-related emissions that can affect attainment and maintenance. However, this belief is not the basis for this SIP call action, only an expected useful outcome of it.

Footnote 4 of the EPA's 1999 SSM Guidance suggested that "[s]tates may account for [potential worst-case emissions that could occur during startup and shutdown] by including them in their routine rule effectiveness estimates." This statement in the 1999 document's footnote may seem at odds with the statement in this response that the "rule effectiveness" concept was not meant to embrace excess emissions during startup and shutdown that were allowed because of SIP exemptions. However, the footnote is attached to text that addresses "worst-case" emissions that are higher than allowed by the applicable SIP, because that text speaks about the required demonstration to support a SIP revision containing an affirmative defense for violations of applicable SIP emission limitations. Thus, estimates of such worst-case emissions would reflect the effects of noncompliance, which is within the intended scope of the EPA's "rule effectiveness" guidance. Footnote 4 was not referring to the issue of how to account for the effect of SSM exemptions.[375]

Comment: A number of commenters stated their understanding that the EPA has proposed SIP calls as a way of improving air agencies' implementation of EPA-specified requirements in emissions inventory or modeling, and they stated that if this is the EPA's concern then the EPA should address the issue in that context.

Response: To clarify its position, the EPA explains here that while it believes that approvable SIP revisions in response to the proposed SIP calls will have the benefit of providing information on actual emissions during SSM events that can improve emissions inventories and modeling, the availability of this additional information is not the basis for the SIP calls that are being finalized. The EPA believes that it is a fundamental requirement of the CAA that SIP emission limitations be continuous, which therefore precludes exemptions for excess emissions during startup and shutdown.

Comment: An air agency commenter stated that facilities in its state are required to submit data on all annual emissions, including emissions from startup and shutdown operation (and malfunctions), as part of its annual emissions inventory, and that it takes these emissions into consideration as part of SIP development.

Response: The EPA appreciates the efforts of this commenter to develop SIPs that account for all emissions. However, these efforts and whatever degree of success the commenter enjoys do not change the fundamental requirement of the CAA that SIP emission limitations be continuous, which therefore precludes exemptions for excess emissions during startup and shutdown.

Comment: A commenter argued that even to the extent SSM emissions present some level of uncertainty in model-based air quality projections, that uncertainty is small compared to other sources of uncertainty in modeling analyses, and so SSM emissions will not have any significant impact on attainment demonstrations or any underlying air quality modeling analysis.

Response: In support of this very general statement, the commenter provided only its own assessment of its own experience and the similar opinion of unnamed permitting agencies. In any case, this SIP call action is not based on any EPA determination about how modeling uncertainties due to SSM exemptions in SIPs compare to other modeling uncertainties.

20. Comments that exemptions for excess emissions during SSM events are not a concern with respect to PSD and protection of PSD increments.

Comment: Commenters asserted that the EPA has not adequately explained the basis for its concerns about the impact of emissions during SSM events on PSD increments.

Response: The EPA disagrees. As explained in detail in the background memorandum included in the docket for this rulemaking,[376] CAA section 110(a)(2)(C) requires that a state's SIP must include a PSD program to meet CAA requirements for attainment areas.[377] In addition, section 161 explains that "[e]ach [SIP] shall contain emission limitations and such other measures as may be necessary . . . to prevent significant deterioration of air quality for such region . . . designated . . . as attainment or unclassifiable." Specifically, each SIP is required to contain measures assuring that certain pollutants do not exceed designated maximum allowable increases over baseline concentrations.[378] These maximum allowable increases are known as PSD increments. Applicable EPA regulations require states to include in their SIPs emission limitations and such other measures as may be necessary in attainment areas to assure protection of PSD increments.[379] Authorizing sources in attainment areas to exceed SIP emission limitations during SSM events compromises the protection of these increments.

The commenters' concerns seem to be focused on PSD permitting for individual sources rather than on emission limitations in SIPs. The commenters asserted that the EPA already adequately accounts for all emissions during SSM events when calculating the baseline and increment consumption and expressed concern about the potential for "double counting" of emissions by counting them both toward the baseline and against increment. The EPA agrees that

[375] In light of the *NRDC* v. *EPA* decision, affirmative defense provisions are not allowed in SIPs any longer, so this aspect of the 1999 SSM Guidance is no longer relevant.

[376] *See* Memorandum, "Statutory, Regulatory, and Policy Context for this Rulemaking," February 4, in the rulemaking docket at EPA–HQ–OAR–2012–0322–0029.

[377] "Each implementation plan . . . shall . .ensp;. include a program to provide for . . . regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that [NAAQS] are achieved, including a permit program as required in . . . part C." CAA section 110(a)(2)(C).

[378] CAA section 163.

[379] *See* 40 CFR 51.166(c).

Response: The EPA disagrees with the commenters' logic that the mere existence of enforcement actions negates the concern that deficient SIP provisions interfere with effective enforcement of SIP emission limitations. The EPA believes that deficient SIP provisions can interfere with effective enforcement by air agencies, the EPA and the public to assure that sources comply with CAA requirements, contrary to the fundamental enforcement structure provided in CAA sections 113 and 304. For example, automatic or discretionary exemption provisions for excess emissions during SSM events by definition completely eliminate the possibility of enforcement for what may otherwise be clear violations of emissions limitations during those times. Affirmative defense provisions purport to alter or eliminate the statutory jurisdiction of courts to determine liability or to impose remedies for violations. These types of provisions eliminate the opportunity to obtain injunctive relief or penalties that may be needed to ensure appropriate efforts to design, operate and maintain sources so as to prevent and to minimize excess emissions, protect the NAAQS and PSD increments and meet other CAA requirements. Similarly, the exemption of sources from liability for excess emissions during SSM events eliminates incentives to minimize emissions during those times. These exemptions thus reduce deterrence of future violations from the same sources or other sources during these periods.

In the February 2013 proposal, the EPA discussed in detail an enforcement case that illustrates and supports the Agency's position.[383] In that case, citizen suit plaintiffs sought to bring an enforcement action against a source for thousands of self-reported exceedances of emission limitations in the source's operating permit. The source asserted that those exceedances were not "violations," through application of a permit provision that mirrored an underlying Georgia SIP provision. The U.S. Court of Appeals for the Eleventh Circuit (Eleventh Circuit) ultimately determined that the provision created an "affirmative defense" for SSM emissions that shielded the source from liability for numerous violations. The court noted that even if the approved provision in Georgia's SIP was inconsistent with the EPA's guidance on the proper treatment of excess emissions during SSM events, the defendant could rely on the provision because the EPA had not taken action through rulemaking to rectify any discrepancy.[384] In this final action on the Petition, the EPA has determined that the specific SIP provision at issue in that case is deficient for several reasons. Had that deficient SIP provision not been in the SIP at the time of the enforcement action, then the provision would not have had any effect on the outcome of the case. Instead, the courts would have evaluated the alleged violations and imposed any appropriate remedies consistent with the applicable CAA provisions, rather than in accordance with the SIP provision that imposed the state's enforcement discretion preferences on other parties contrary to their rights under the CAA.

As the outcome of this case demonstrates, the mere fact that a number of enforcement actions have been filed does not mean that the deficient SIP provisions identified by the EPA in this SIP call action do not hinder effective enforcement under sections 113 and 304. To the contrary, that case illustrates exactly how conduct that might otherwise be a clear violation of the applicable SIP emission limitations by a source was rendered immune from enforcement through the application of a provision that operated to excuse liability for violations and potentially allowed unlimited excess emissions during SSM events.

The commenters cited 15 other enforcement cases brought by government and citizen groups over a span of 17 years, but the commenters do not indicate whether any SIP provisions relevant to emissions during SSM events were involved, nor do the commenters indicate whether any provisions at issue in this SIP call action were involved in any of the enforcement cases it cited.[385] Even if an enforcement action has been initiated, the EPA's fundamental point remains: SIP provisions that exempt what would otherwise be a violation of SIP emissions limitations can undermine effective enforcement during times when the CAA requires continuous compliance with such emissions limitations. By interfering with enforcement, such provisions undermine the integrity of the SIP process and the rights of parties to seek enforcement for violation of SIP emission limitations.

A number of commenters on the February 2013 proposal indicated that, from their perspective, a primary benefit of automatic or discretionary exemptions in SIP provisions applicable to emissions during SSM events is to shield sources from liability. Similarly, commenters on the SNPR indicated that, from their perspective, a key benefit of affirmative defense provisions is to prevent what is in their opinion inappropriate enforcement action for violations of SIP emission limitations during SSM events. The EPA does not agree that the purpose of SIP provisions should be to preclude or impede effective enforcement of SIP emission limitations. To the contrary, the potential for enforcement for violations of CAA requirements is a key component of the enforcement structure of the CAA. To the extent that commenters are concerned about inappropriate enforcement actions for conduct that is not in violation of CAA requirements, the EPA believes that the sources already have the ability to defend against any such invalid claims in court.

23. Comments that the EPA's alleged inclusion of "exemptions" or "affirmative defenses" in enforcement consent decrees negates the Agency's interpretation of the CAA to prohibit them in SIP provisions.

Comment: One industry commenter claimed that the EPA has itself recently promulgated an exemption for emissions during SSM events. The commenter cited an April 1, 2013, settlement agreement in a CAA enforcement case against Dominion Energy as an example. According to the commenter, this settlement agreement "provides allowances for excess emissions during startup and shutdown" and "allows an EGU to operate without the ESP when it is not practicable." The commenter characterized this as the creation of an exemption from the applicable emission limitations during startup and shutdown. The commenter further alleged that the settlement agreement "provides for an affirmative defense to stipulated penalties for excess emissions occurring during start up and shutdown." The commenter intended the fact that the EPA agrees to this type

[383] *See* February 2013 proposal, 78 FR 12459 at 12504–05.

[384] *See Sierra Club* v. *Georgia Power Co.*, 443 F.3d 1346 (11th Cir. 2006).

[385] Even if these cases did all involve SIP provisions relevant to SSM events, the sampling of cases cited by the commenter still do not prove the commenter's point. The commenter indicated that 11 of the 15 cited cases resulted in settlement. The EPA presumes that neither party admitted any fault in these settlements and it remains unknown whether the court would have found the existence of a violation. In addition, because these cases were settled, it is unknown whether exemption or affirmative defense provisions would have prevented the court from finding liability for violation of a CAA emissions limitation that would otherwise have applied. In one additional case cited by the commenter, the court determined that the defendant successfully asserted an affirmative defense to alleged violations of a 6-minute 40-percent opacity limit. The outcome of this case evidently supports the EPA's concerns about the impacts of such provisions.

other SIP provisions and the requirements of source operating permits. Because these corrections to SIP provisions and permit requirements will take time to occur, the commenter asserted that "a transition period of reasonable length far exceeding 48 months will be needed to shield industry from enforcement." The commenter thus requested that the EPA impose such a transition period. In addition, the commenter suggested that the EPA should create "an interim enforcement policy" to shield sources and allow reliance on affirmative defense provisions "even after SIPs are corrected until permits reflect those changes." The commenter posed this request based upon concern that there will be industry confusion concerning what requirements apply to individual sources until permits are revised to reflect the correction of the deficient SIP provisions.

Response: The EPA agrees with the commenter that it will take time for states to make the necessary SIP revisions in response to this SIP call, for the EPA to evaluate and act upon those SIP submissions and subsequently for states or the Agency to revise operating permits in the ordinary course to reflect the corrected state SIPs. As explained in the February 2013 proposal, the EPA consciously elected to proceed via its SIP call authority under section 110(k)(5) and to provide the statutory maximum of 18 months for the submission of corrective SIP revisions. The EPA chose this path specifically in order to provide states with time to revise their deficient SIP provisions correctly and in the manner that they think most appropriate, consistent with CAA requirements. The EPA also explicitly acknowledged that during the pendency of the SIP revision process, and during the time that it will take for permit terms to be revised in the ordinary course, sources will remain legally authorized to emit in accordance with current permit terms.[386]

The EPA is in this final action reiterating that the issuance of the SIP call action does not automatically alter any provisions in existing operating permits. By design, sources for which emission limitations are incorporated in permits will thus have a *de facto* transition period during which they can take steps to assure that they will ultimately meet the revised SIP provisions (*e.g.*, by changing their equipment or mode of operation to meet an appropriate emission limitation that applies during startup and shutdown instead of relying on exemptions). Sources subject to permit requirements will thus have yet more time (beyond the 18 months allowed for the SIP revision in response to this SIP call action) over the permit review cycle to take steps to meet revised permit terms reflecting the revised SIP provisions. However, the EPA does not agree with the commenter that there is a need for a "transition period" to "shield" sources from enforcement. The EPA's objective in this action is to eliminate impermissible SIP provisions that exempt emissions during SSM events or otherwise interfere with effective enforcement for violations that occur during such events. Further delaying the time by which sources will be expected to comply with SIP provisions that are consistent with CAA requirements is inappropriate. Moreover, the primary purpose of SIP provisions is not to shield sources from liability for violations of CAA requirements but rather to assure that sources are required to meet CAA requirements.

The EPA shares the commenter's concern that there is the potential for confusion on the part of sources or other parties in the interim period between the correction of deficient SIP provisions and the revision of source operating permits in the ordinary course. However, the EPA presumes that most sources required to have a permit, especially a title V operating permit, are sufficiently sophisticated and aware of their legal rights and responsibilities that the possibility for confusion on the part of sources should be very limited. Likewise, by making clear in this final action that sources will continue to be authorized to operate in accordance with existing permit terms until such time as the permits are revised after the necessary SIP revision, the EPA anticipates that other parties should be on notice of this fact as well. Regardless of the potential for confusion by any party, the EPA believes that the legal principle of the "permit shield" is well known by regulated entities, regulators, courts and other interested parties. Accordingly, the EPA is not issuing any "enforcement policy" in connection with this SIP call action.

26. Comments that a SIP call directing states to eliminate exemptions for excess emissions during SSM events is a "paper exercise" or "exalts form over substance."

Comment: A number of commenters argued that by requiring states to correct deficient SIP provisions, such as by requiring removal of exemptions for emissions during SSM events, this SIP call action will not result in any environmental benefits. For example, state commenters claimed that they will not be able simply to revise regulations to eliminate startup and shutdown exemptions. Instead, the commenters claimed, the states will need to revise the emissions limitations completely in order to take into account the EPA's interpretation of the CAA that such exemptions are impermissible. The commenters asserted that rewriting the state regulations will produce no reduction in emissions or improvement in air quality and will merely impose burdens upon states to change existing regulations. The implication of the commenters' argument is that states will merely revise SIP emission limitations to allow the same amount of emissions during SSM events by some other means, rather than by establishing emission limitations that would encourage sources to be designed, operated and maintained in a fashion that would better control those emissions.

Response: The EPA does not agree with the commenters' assertion that revisions to the affected SIP provisions in response to this SIP call action will produce no emissions reductions or improvements in air quality. The EPA recognizes that some states may elect to develop revised emission limitations that provide for alternative numerical limitations, control technologies or work practices applicable during startup and shutdown that differ from requirements applicable during other modes of source operation. Other states may elect to develop completely revised emission limitations and elevate the level of the numerical emission limitation that applies at all times to account for greater emissions during startup and shutdown. However, any such revised emission limitations must comply with applicable substantive CAA requirements relevant to the type of SIP provision at issue, *e.g.* be RACM and RACT for sources located in nonattainment areas, and must meet other requirements for SIP revisions such as in sections 110(k)(3), 110(l) and 193.

The EPA believes that revision of the existing deficient SIP provisions has the potential to decrease emissions significantly in comparison to existing provisions, such as those that authorize unlimited emissions during startup and shutdown. Elimination of automatic and director's discretion exemptions for emissions during SSM events should encourage sources to reduce emissions during startup and shutdown and to take steps to avoid malfunctions. Elimination of inappropriate enforcement discretion provisions and affirmative defense provisions should

[386] *See* February 2013 proposal, 78 FR 12459 at 12482.

need to update the permits applicable to those sources is part of that process. This SIP call action simply directs the affected states to address specific deficiencies in their SIP provisions as part of this normal evolutionary process.

28. Comments that directing states to correct their existing SIP provisions will require many sources to change terms of their operating permits.

Comment: A number of commenters opposed the February 2013 proposal because of the administrative burden the action would impose on air agencies and sources. Commenters asserted that requiring states to remove affirmative defense provisions for startup and shutdown from SIPs and to develop alternative emission limitations for such periods of operation instead is unreasonable. Other commenters argued that requiring removal of the deficient SIP provisions would impose enormous and time-consuming burdens on permitting authorities and the regulated community associated with the development of new or revised emissions limitations for startup and shutdown, the revision of SIPs and the revision of permits to incorporate such revised emision limitations. Another commenter asserted that sources only accepted numerical limits in permits with the understanding that they also had the benefit of affirmative defenses in the event of exceedances of those numerical emission limits during periods of SSM. The commenter thus argued that sources would seek to revise the permit limits in order to account for the absence of such affirmative defenses.

Response: The EPA acknowledges the concerns raised by commenters concerning the need for air agencies to revise the deficient SIP provisions at issue in this action, as well as the need for the EPA to review the resulting SIP revisions. The EPA does not agree, however, with the commenters' argument that the need for these administrative actions is a justification for leaving the deficient provisions unaddressed.

The EPA also acknowledges that the SIP revisions initiated by this SIP call action will result in the removal of deficient provisions such as automatic and discretionary SSM exemptions, overly broad enforcement discretion provisions and affirmative defense provisions. These SIP revisions will ultimately need to be reflected in revised operating permit terms for sources. This SIP call action will not, however, have an automatic impact on any permit terms and conditions, and the resource burden to revise permits will be spread over many years. After a state makes the necessary revisions to its SIP provisions, any needed revisions to operating permits to reflect the revised SIP provisions will occur in the ordinary course as the state issues new permits or reviews and revises existing permits. For example, in the case of title V operating permits, permits with more than 3 years remaining will be reopened to add new applicable requirements within 18 months of the promulgation of the requirements. If a permit has less than 3 years remaining, the new applicable requirement will be added at renewal.[388]

IX. What is the EPA's final action for each of the specific SIP provisions identified in the Petition or by the EPA?

A. Overview of the EPA's Evaluation of Specific SIP Provisions

In reviewing the Petitioner's concerns with respect to the specific SIP provisions identified in the Petition, the EPA notes that most of the provisions relate to a small number of common issues. Many of these provisions are as old as the original SIPs that the EPA approved in the early 1970s, when the states and the EPA had limited experience in evaluating the provisions' adequacy, enforceability and consistency with CAA requirements.

In some instances the EPA does not agree with the Petitioner's reading of the provision in question, or with the Petitioner's conclusion that the provision is inconsistent with the requirements of the CAA. However, given the common issues that arise for multiple states in the Petition as well as in the EPA's independent evaluation, there are some overarching conceptual points that merit discussion in general terms. Thus, this section IX.A of the document provides a general discussion of each of the overarching points, including a summary of what the EPA proposed to determine with respect to the relevant SIP provisions collectively. The EPA received comments on the proposed determinations from affected states, the Petitioner and other commenters. A detailed discussion of the comments received with the EPA's responses is provided in the Response to Comment document available in the docket for this rulemaking.

Sections IX.B through IX.K of this document name the specific SIP provisions identified in the Petition or by the EPA, including a summary of what the EPA proposed and followed by the EPA's stated final action with respect to each SIP provision.

[388] *See* 40 CFR 70.7(f)(1)(i).

1. Automatic Exemption Provisions

A significant number of provisions identified by the Petitioner pertain to existing SIP provisions that create automatic exemptions for excess emissions during periods of SSM. Some of these provisions also pertain to exemptions for excess emissions that occur during maintenance, load change or other types of normal source operation. These provisions typically provide that a source subject to a specific SIP emission limitation is exempted from compliance during SSM, so that the excess emissions are defined as not violations. Most of these provisions are artifacts of the early phases of the SIP program, approved before state and EPA regulators recognized the implications of such exemptions. Whatever the genesis of these existing SIP provisions, however, these automatic exemptions from emission limitations are not consistent with the CAA, as the EPA has stated in its SSM Policy since at least 1982.

After evaluating the Petition, the EPA proposed to determine that a number of states have existing SIP provisions that create impermissible automatic exemptions for excess emissions during malfunctions or during startup, shutdown or other types of normal source operation. In those instances where the EPA agreed that a SIP provision identified by the Petitioner contained such an exemption contrary to the requirements of the CAA, the EPA proposed to grant the Petition and accordingly to issue a SIP call to the appropriate state.

2. Director's Discretion Exemption Provisions

Another category of problematic SIP provision identified by the Petitioner is exemptions for excess emissions that, while not automatic, are exemptions for such emissions granted at the discretion of state regulatory personnel. In some cases, the SIP provision in question may provide some minimal degree of process and some parameters for the granting of such discretionary exemptions, but the typical provision at issue allows state personnel to decide unilaterally and without meaningful limitations that what would otherwise be a violation of the applicable emission limitation is instead exempt. Because the state personnel have the authority to decide that the excess emissions at issue are not a violation of the applicable emission limitation, such a decision would transform the violation into a nonviolation, thereby barring enforcement by the EPA or others.

by the Petitioner, the EPA in the SNPR reversed its prior proposed denial of the Petition, and it newly proposed findings of inadequacy and SIP calls. Further, for some affirmative defense provisions that were not explicitly identified by the Petitioner, the EPA in the SNPR proposed findings of inadequacy and SIP calls for additional affirmative defense provisions that were not explicitly identified by the Petitioner.

B. Affected States in EPA Region I

1. Maine

As described in section IX.B.1 of the February 2013 proposal, the Petitioner first objected to a specific provision in the Maine SIP that provides an exemption for certain boilers from otherwise applicable SIP visible emission limits during startup and shutdown (06–096–101 Me. Code R. § 3). Second, the Petitioner objected to a provision that empowers the state to "exempt emissions occurring during periods of unavoidable malfunction or unplanned shutdown from civil penalty under section 349, subsection 2" (06–096–101 Me. Code R. § 4).

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to 06–096–101 Me. Code R. § 3 and 06–096–101 Me. Code R. § 4.

Consequently, the EPA proposed to find that 06–096–101 Me. Code R. § 3 and 06–096–101 Me. Code R. § 4 are substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to these provisions.

In this final action, the EPA is granting the Petition with respect to 06–096–101 Me. Code R. § 3 and 06–096–101 Me. Code R. § 4. Accordingly, the EPA is finding that these provisions are substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call to Maine to correct its SIP with respect to these provisions. This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Maine SIP that the EPA received and considered during the development of this rulemaking.

2. New Hampshire

As described in section IX.B.2 of the February 2013 proposal, the Petitioner objected to two generally applicable provisions in the New Hampshire SIP that allow emissions in excess of otherwise applicable SIP emission limitations during "malfunction or breakdown of any component part of the air pollution control equipment." The Petitioner argued that the challenged provisions provide an automatic exemption for excess emissions during the first 48 hours when any component part of air pollution control equipment malfunctions (N.H. Code R. Env-A 902.03) and further provide that "[t]he director may . . . grant an extension of time or a temporary variance" for excess emissions outside of the initial 48-hour time period (N.H. Code R. Env-A 902.04). Second, the Petitioner objected to two specific provisions in the New Hampshire SIP that provide source-specific exemptions for periods of startup for "any process, manufacturing and service industry" (N.H. Code R. Env-A 1203.05) and for pre-June 1974 asphalt plants during startup, provided they are at 60-percent opacity for no more than 3 minutes (N.H. Code R. Env-A 1207.02).

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to N.H. Code R. Env-A 902.03, N.H. Code R. Env-A 1203.05 and N.H. Code R. Env-A 902.04. Also for reasons explained fully in the February 2013 proposal, the EPA proposed to deny the Petition with respect to N.H. Code R. Env-A 1207.02.

Consequently, the EPA proposed to find that N.H. Code R. Env-A 902.03, N.H. Code R. Env-A 1203.05 and N.H. Code R. Env-A 902.04 were substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to these provisions. Through comments submitted on the February 2013 proposal, however, the EPA has ascertained that the versions of N.H. Code R. Env-A 902.03 and N.H. Code R. Env-A 902.04 identified in the Petition and evaluated in the February 2013 proposal are no longer in the state's SIP. In November 2012, the EPA approved a SIP revision that replaced N.H. Code R. Env-A 902.03 and N.H. Code R. Env-A 902.04 with a new version of Env-A 900 that does not contain the deficient provisions identified in the February 2013 proposal.[390] These provisions no longer exist for purposes of state or federal law. In addition, the EPA has determined that the version of N.H. Code R. Env-A 1203.05 identified in the Petition and the February 2013 proposal is no longer in the state's SIP as a result of another SIP revision.[391] Because these three provisions are no longer components of the EPA-approved SIP for the state of New Hampshire, the Petition is moot with respect to these provisions and there is no need for a SIP call with respect to these no longer extant provisions.

In this final action, the EPA is denying the Petition with respect to N.H. Code R. Env-A 902.03, N.H. Code R. Env-A 902.04, N.H. Code R. Env-A 1203.05 and N.H. Code R. Env-A 1207.02. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the New Hampshire SIP that the EPA received and considered during the development of this rulemaking.

3. Rhode Island

As described in section IX.B.3 of the February 2013 proposal, the Petitioner objected to a generally applicable provision in the Rhode Island SIP that allows for a case-by-case petition procedure whereby a source can obtain a variance from state personnel under R.I. Gen. Laws § 23–23–15 to continue to operate during a malfunction of its control equipment that lasts more than 24 hours, if the source demonstrates that enforcement would constitute undue hardship without a corresponding benefit (25–4–13 R.I. Code R. § 16.2).

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to 25–4–13 R.I. Code R. § 16.2.

Consequently, the EPA proposed to find that 25–4–13 R.I. Code R. § 16.2 is substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to this provision.

In this final action, the EPA is granting the Petition with respect to 25–4–13 R.I. Code R. § 16.2. Accordingly, the EPA is finding that this provision is substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to this provision. This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Rhode Island SIP that the EPA received and considered during the development of this rulemaking.

[390] *See* "Approval and Promulgation of Air Quality Implementation Plans; New Hampshire; Reasonably Available Control Technology for the 1997 8-Hour Ozone Standard; Direct final rule," 77 FR 66388 (November 5, 2012).

[391] *See* "Approval and Promulgation of Air Quality Implementation Plans; New Hampshire; Reasonably Available Control Technology Update To Address Control Techniques Guidelines Issued in 2006, 2007, and 2008; Direct final rule," 77 FR 66921 (November 8, 2012).

In this final action, the EPA is granting the Petition with respect to D.C. Mun. Regs. tit. 20 § 107.3, D.C. Mun. Regs. tit. 20 §§ 606.1 and 606.2 and D.C. Mun. Regs. tit. 20 § 606.4 and is denying the Petition with respect to D.C. Mun. Regs. tit. 20 § 805.1(c)(2). Accordingly, the EPA is finding that the provisions in D.C. Mun. Regs. tit. 20 § 107.3, D.C. Mun. Regs. tit. 20 §§ 606.1 and 606.2 and D.C. Mun. Regs. tit. 20 § 606.4 are substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call to the District of Columbia to correct its SIP with respect to these provisions. This action is fully consistent with what the EPA proposed in February 2013 as revised in the SNPR. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the DC SIP that the EPA received and considered during the development of this rulemaking.

3. Virginia

As described in section IX.D.3 of the February 2013 proposal, the Petitioner objected to a generally applicable provision in the Virginia SIP that allows for discretionary exemptions during periods of malfunction (9 Va. Admin. Code § 5–20–180(G)). First, the Petitioner objected because this provision provides an exemption from the otherwise applicable SIP emission limitations. Second, the Petitioner objected to the discretionary exemption for excess emissions during malfunction because the provision gives the state the authority to determine whether a violation "shall be judged to have taken place." Third, the Petitioner argued that while the regulation provides criteria, akin to an affirmative defense, by which the state must make such a judgment that the event is not a violation, the criteria "fall far short of EPA policy at the time" and the provision "fails to establish any procedure through which the criteria are to be evaluated."

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to 9 Va. Admin. Code § 5–20–180(G). Also for reasons explained in the February 2013 proposal, the EPA proposed to grant the Petition with respect to this provision on the basis that it was not a permissible affirmative defense provision consistent with the requirements of the CAA as interpreted in the EPA's SSM Policy.

Subsequently, for reasons explained in the SNPR, the EPA reproposed granting of the Petition with respect to 9 Va. Admin. Code § 5–20–180(G), but it proposed to revise the basis for the finding of substantial inadequacy and the SIP call for this provision.

Consequently, the EPA proposed to find that 9 Va. Admin. Code § 5–20–180(G) is substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to this provision.

In this final action, the EPA is granting the Petition with respect to 9 Va. Admin. Code § 5–20–180(G) and the EPA is thus issuing a SIP call with respect to this provision. This action is fully consistent with what the EPA proposed in February 2013 as revised in the SNPR. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Virginia SIP that the EPA received and considered during the development of this rulemaking.

4. West Virginia

As described in section IX.D.4 of the February 2013 proposal, the Petitioner made four types of objections identifying inadequacies regarding SSM provisions in West Virginia's SIP. First, the Petitioner objected to three specific provisions in the West Virginia SIP that allow for automatic exemptions from emission limitations, standards, and monitoring and recordkeeping requirements for excess emission during startup, shutdown, or malfunction (W. Va. Code R. § 45–2–9.1, W. Va. Code R. § 45–7–10.3 and W. Va. Code R. § 45–40–100.8). Second, the Petitioner objected to seven discretionary exemption provisions because these provisions provide exemptions from the otherwise applicable SIP emission limitations. The Petitioner noted that the provisions allow a state official to "grant an exception to the otherwise applicable visible emissions standards" due to "unavoidable shortage of fuel" or "any emergency situation or condition creating a threat to public safety or welfare" (W. Va. Code R. § 45–2–10.1), to permit excess emissions "due to unavoidable malfunctions of equipment" (W. Va. Code R. § 45–3–7.1, W. Va. Code R. § 45–5–13.1, W. Va. Code R. § 45–6–8.2, W. Va. Code R. § 45–7–9.1 and W. Va. Code R. § 45–10–9.1) and to permit exceedances where the limit cannot be "satisfied" because of "routine maintenance" or "unavoidable malfunction" (W. Va. Code R. § 45–21–9.3). Third, the Petitioner objected to the alternative limit imposed on hot mix asphalt plants during periods of startup and shutdown in W. Va. Code R. § 45–3–3.2 because it was "not sufficiently justified" under the EPA's SSM Policy regarding source category-specific rules. Fourth, the Petitioner objected to a discretionary provision allowing the state to approve an alternative visible emission standard during startups and shutdowns for manufacturing processes and associated operations (W. Va. Code R. § 45–7–10.4). The Petitioner argued that such a provision "allows a decision of the state to preclude enforcement by EPA and citizens."

For reasons explained in the February 2013 proposal, the EPA proposed to grant the Petition with respect to W. Va. Code R. § 45–2–9.1, W. Va. Code R. § 45–7–10.3 and W. Va. Code R. § 45–40–100.8 on the basis that each of these provisions allows for automatic exemptions. Also for reasons explained in the February 2013 proposal, the EPA proposed to grant the Petition with respect to W. Va. Code R. § 45–2–10.1, W. Va. Code R. § 45–3–7.1, W. Va. Code R. § 45–5–13.1, W. Va. Code R. § 45–6–8.2, W. Va. Code R. § 45–7–9.1, W. Va. Code R. § 45–10–9.1 and W. Va. Code R. § 45–21–9.3 on the basis that these provisions allow for discretionary exemptions from otherwise applicable SIP emission limitations. Further, for reasons explained in the February 2013 proposal, the EPA proposed to grant the Petition with respect to W. Va. Code R. § 45–3–3.2, W. Va. Code R. § 45–2–10.2 and W. Va. Code R. § 45–7–10.4. The W. Va. Code R. § 45–3–3.2 applies to a broad category of sources and is not narrowly limited to a source category that uses a specific control strategy, as required by the EPA's SSM Policy interpreting the CAA. Similarly, W. Va. Code R. § 45–2–10.2 is inconsistent with the EPA's SSM Policy interpreting the CAA because it is an alternative limit that allows for discretionary exemptions from otherwise applicable SIP emission limitations.[392] The W. Va. Code R. § 45–

[392] As explained in the February 2013 proposal, the Petitioner specifically focused on concern with W. Va. Code R. § 45–2–10.1, but the same issue affects W. Va. Code R. § 45–2–10.2, and so the EPA similarly proposed to issue a SIP call with respect to the latter provision. *See* 78 FR 12459 at 12500, n.111. W. Va. Code R. § 45–2–10.2 is an alternative limit that applies during periods of maintenance. In the February 2013 proposal, the EPA noted that this provision was inconsistent with the EPA's SSM Policy interpreting the CAA because it was an alternative limit that specifically applied during periods of maintenance. Although the EPA originally contemplated that an alternative emission limitation could appropriately apply only during startup or shutdown, the EPA recognizes in section VII.B of this document that it may be appropriate for an air agency to establish alternative emission limitations that apply during modes of source operation other than during startup and shutdown, but any such alternative emission limitations should be developed using the same criteria that the EPA recommends for those applicable during startup and shutdown. The alternative emission limitation applicable during maintenance does not appear to have been developed using the

Continued

used "best operational practices" to minimize emissions during the SSM event.

First, the Petitioner objected because the provision creates an exemption from the applicable emission limitations by providing that the excess emissions "shall be allowed" subject to certain conditions. Second, the Petitioner argued that although the provision provides some "substantive criteria," the provision does not meet the criteria the EPA recommended at the time for an affirmative defense provision consistent with the requirements of the CAA in the EPA's SSM Policy. Third, the Petitioner asserted that the provision is not a permissible "enforcement discretion" provision applicable only to state personnel, because it "is susceptible to interpretation as an enforcement exemption, precluding EPA and citizen enforcement as well as state enforcement."

For reasons explained in the February 2013 proposal, the EPA proposed to grant the Petition with respect to Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7). Also for reasons explained in the February 2013 proposal, the EPA proposed to grant the Petition with respect to this provision on the basis that it was not a permissible affirmative defense provision consistent with the requirements of the CAA and the EPA's recommendations in the EPA's SSM Policy at the time.

Subsequently, for reasons explained in the SNPR, the EPA reproposed granting of the Petition with respect to Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7), but it proposed to revise the basis for the finding of substantial inadequacy and the SIP call for this provision.

Consequently, the EPA proposed to find that Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7) is substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to this provision.

In this final action, the EPA is granting the Petition with respect to Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7). Accordingly, the EPA is finding that this provision is substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to this provision. This action is fully consistent with what the EPA proposed in February 2013 as revised in the SNPR. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Georgia SIP that the EPA received and considered during the development of this rulemaking.

4. Kentucky

As described in section IX.E.4 of the February 2013 proposal, the Petitioner objected to a generally applicable provision that allows discretionary exemptions from otherwise applicable SIP emission limitations in Kentucky's SIP (401 KAR 50:055 § 1(1)).

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to 401 KAR 50:055 § 1(1).

Consequently, the EPA proposed to find that 401 KAR 50:055 § 1(1) is substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to this provision.

In this final action, the EPA is granting the Petition with respect to 401 KAR 50:055 § 1(1). Accordingly, the EPA is finding that this provision is substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to this provision. This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Kentucky SIP that the EPA received and considered during the development of this rulemaking.

5. Kentucky: Jefferson County

As described in section IX.E.5 of the February 2013 proposal, the Petitioner objected to a generally applicable provision in the Jefferson County Air Regulations 1.07 because it provided for discretionary exemptions from compliance with emission limitations during SSM. The provision required different demonstrations for exemptions for excess emissions during startup and shutdown (Regulation 1.07 § 3), malfunction (Regulation 1.07 § 4 and § 7) and emergency (Regulation 1.07 § 5 and § 7). Second, the Petitioner objected to the affirmative defense for emergencies in Jefferson County Air Regulations 1.07.

For reasons explained in the February 2013 proposal, the EPA proposed to grant the Petition with respect to provisions in the Jefferson County Air Regulations 1.07.

Subsequently, for reasons explained fully in the SNPR, the EPA reversed its prior proposed granting of the Petition with respect to Jefferson County Air Regulations 1.07. For Jefferson County, Kentucky, the provisions for which the EPA proposed in February 2013 to grant the Petition were subsequently removed from the SIP. Thus, in the SNPR, the EPA proposed instead to deny the Petition.[394] As explained in the SNPR, the state of Kentucky has revised the SIP provisions applicable to Jefferson County and eliminated the SIP inadequacies identified in the February 2013 proposal document. The EPA has already approved the necessary SIP revisions.[395] Accordingly, the EPA's final action on the Petition does not include a finding of substantial inadequacy and SIP call for Jefferson County, Kentucky.

In this final action, the EPA is denying the Petition with respect to Jefferson County Air Regulations 1.07. This action is fully consistent with what the EPA proposed in February 2013 as revised in the SNPR. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Kentucky SIP that the EPA received and considered during the development of this rulemaking.

6. Mississippi

As described in section IX.E.6 of the February 2013 proposal, the Petitioner objected to two generally applicable provisions in the Mississippi SIP that allow for affirmative defenses for violations of otherwise applicable SIP emission limitations during periods of upset, *i.e.*, malfunctions (11–1–2 Miss. Code R. § 10.1) and unavoidable maintenance (11–1–2 Miss. Code R. § 10.3). First, the Petitioner objected to both of these provisions based on its assertion that the CAA allows no affirmative defense provisions in SIPs. Second, the Petitioner asserted that even if affirmative defense provisions were permissible under the CAA, the affirmative defenses in these provisions "fall far short of the EPA policy at the time." The Petitioner also objected to a generally applicable provision that provides an exemption from otherwise applicable SIP emission limitations during startup and shutdown (11–1–2 Miss. Code R. § 10.2).

For reasons explained in the February 2013 proposal, the EPA proposed to grant the Petition with respect to 11–1–2 Miss. Code R. § 10.1 and 11–1–2 Miss. Code R. § 10.3. Also for reasons explained in the February 2013 proposal, the EPA proposed to grant the petition with respect to these provisions on the basis that they were not appropriate as an affirmative defense provisions because they were

[394] *See* SNPR, 79 FR 55919 at 55925.

[395] *See* Approval and Promulgation of Implementation Plans; Kentucky; Approval of Revisions to the Jefferson County Portion of the Kentucky SIP; Emissions During Startups, Shutdowns, and Malfunctions, 79 FR 33101 (June 10, 2014).

10. Tennessee

As described in section IX.E.10 of the February 2013 proposal, the Petitioner objected to three provisions in the Tennessee SIP. First, the Petitioner objected to two provisions that authorize a state official to decide whether to "excuse or proceed upon" (Tenn. Comp. R. & Regs. 1200–3–20–.07(1)) violations of otherwise applicable SIP emission limitations that occur during "malfunctions, startups, and shutdowns" (Tenn. Comp. R. & Regs. 1200–3–20–.07(3)). Second, the Petitioner objected to a provision that excludes excess visible emissions from the requirement that the state automatically issue a notice of violation for all excess emissions (Tenn. Comp. R. & Regs. 1200–3–5–.02(1)). This provision states that "due allowance may be made for visible emissions in excess of that permitted in this chapter which are necessary or unavoidable due to routine startup and shutdown conditions."

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to Tenn. Comp. R. & Regs. 1200–3–20–.07(1), Tenn. Comp. R. & Regs. 1200–3–20–.07(3) and Tenn. Comp. R. & Regs. 1200–3–5–.02(1).

Consequently, the EPA proposed to find that Tenn. Comp. R. & Regs. 1200–3–20–.07(1), Tenn. Comp. R. & Regs. 1200–3–20–.07(3) and Tenn. Comp. R. & Regs. 1200–3–5–.02(1) are substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to these provisions.

In this final action, the EPA is granting the Petition with respect to Tenn. Comp. R. & Regs. 1200–3–20–.07(1), Tenn. Comp. R. & Regs. 1200–3–20–.07(3) and Tenn. Comp. R. & Regs. 1200–3–5–.02(1). Accordingly, the EPA is finding that these provisions are substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to these provisions. This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Tennessee SIP that the EPA received and considered during the development of this rulemaking.

11. Tennessee: Knox County

As described in section IX.E.11 of the February 2013 proposal, the Petitioner objected to a provision in the Knox County portion of the Tennessee SIP that bars evidence of a violation of SIP emission limitations from being used in a citizen enforcement action (Knox County Regulation 32.1(C)). The provision specifies that "[a] determination that there has been a violation of these regulations or orders issued pursuant thereto shall not be used in any law suit brought by any private citizen."

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to Knox County Regulation 32.1(C). For instance, the regulation was inconsistent with requirements related to credible evidence.

Consequently, the EPA proposed to find that Knox County Regulation 32.1(C) is substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to this provision.

In this final action, the EPA is granting the Petition with respect to Knox County Regulation 32.1(C). Accordingly, the EPA is finding that this provision is substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to this provision. This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Tennessee SIP that the EPA received and considered during the development of this rulemaking.

12. Tennessee: Shelby County

As described in section IX.E.12 of the February 2013 proposal, the Petitioner objected to a provision in the Shelby County Code (Shelby County Code § 16–87) that addresses enforcement for excess emissions that occur during "malfunctions, startups, and shutdowns" by incorporating by reference the state's provisions in Tenn. Comp. R. & Regs. 1200–3–20. Shelby County Code § 16–87 provides that "all such additions, deletions, changes and amendments as may subsequently be made" to Tennessee's regulations will automatically become part of the Shelby County Code.

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to Shelby County Code § 16–87.

Consequently, the EPA proposed to find that Shelby County Code § 16–87 is substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to this provision.

In this final action, the EPA is granting the Petition with respect to Shelby County Code § 16–87. Accordingly, the EPA is finding that this provision is substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to this provision. This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Tennessee SIP that the EPA received and considered during the development of this rulemaking.

F. Affected States in EPA Region V

1. Illinois

As described in section IX.F.1 of the February 2013 proposal, the Petitioner objected to three generally applicable provisions in the Illinois SIP which together have the effect of providing discretionary exemptions from otherwise applicable SIP emission limitations. The Petitioner noted that the provisions invite sources to request, during the permitting process, advance permission to continue to operate during a malfunction or breakdown, and, similarly to request advance permission to "violate" otherwise applicable emission limitations during startup (Ill. Admin. Code tit. 35 § 201.261). The Illinois SIP provisions establish criteria that a state official must consider before granting the advance permission to violate the emission limitations (Ill. Admin. Code tit. 35 § 201.262). However, the Petitioner asserted, the provisions state that, once granted, the advance permission to violate the emission limitations "shall be a prima facie defense to an enforcement action" (Ill. Admin. Code tit. 35 § 201.265).

Further, the Petitioner objected to the use of the term "prima facie defense" in Ill. Admin. Code tit. 35 § 201.265, arguing that the term is "ambiguous in its operation." The Petitioner argued that the provision is not clear regarding whether the defense is to be evaluated "in a judicial or administrative proceeding or whether the Agency determines its availability." Allowing defenses to be raised in these undefined contexts, the Petitioner argued, is "inconsistent with the enforcement structure of the Clean Air Act."

For reasons explained in the February 2013 proposal, the EPA proposed to grant the Petition with respect to Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262 and Ill. Admin. Code tit. 35 § 201.265.

Subsequently, for reasons explained fully in the SNPR, the EPA reproposed granting of the Petition with respect to the affirmative defense provisions in Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262 and Ill.

Admin. Code 3745–75–02(E), Ohio Admin. Code 3745–75–02(J), Ohio Admin. Code 3745–75–03(I), Ohio Admin. Code 3745–75–04(K) and Ohio Admin. Code 3745–75–04(L).

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to Ohio Admin. Code 3745–15–06(A)(3), Ohio Admin. Code 3745–17–07(A)(3)(c), Ohio Admin. Code 3745–17–07(B)(11)(f) and Ohio Admin. Code 3745–14–11(D). Also for reasons explained fully in the February 2013 proposal, the EPA proposed to deny the Petition with respect to Ohio Admin. Code 3745–75–02(E), Ohio Admin. Code 3745–75–02(J), Ohio Admin. Code 3745–75–03(I), Ohio Admin. Code 3745–75–04(K) and Ohio Admin. Code 3745–75–04(L), on the basis that they are not part of the Ohio SIP and thus cannot represent a substantial inadequacy in the SIP. In addition, for reasons explained fully in the February 2013 proposal, the EPA proposed to find that another provision, Ohio Admin. Code 3745–15–06(C), is substantially inadequate to meet CAA requirements and proposed to issue a SIP call with respect to this provision, even though the Petitioner did not request that the EPA evaluate this provision. As explained in the February 2013 proposal, the EPA determined that Ohio Admin. Code 3745–15–06(C) was the regulatory mechanism in the SIP by which exemptions are granted in the two provisions to which the Petitioner did object.

Consequently, the EPA proposed to find that the provisions in Ohio Admin. Code 3745–15–06(A)(3), Ohio Admin. Code 3745–17–07(A)(3)(c), Ohio Admin. Code 3745–17–07(B)(11)(f), Ohio Admin. Code 3745–14–11(D) and Ohio Admin. Code 3745–15–06(C) are substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to these provisions.

In this final action, the EPA is granting the Petition with respect to Ohio Admin. Code 3745–15–06(A)(3), Ohio Admin. Code 3745–17–07(A)(3)(c), Ohio Admin. Code 3745–17–07(B)(11)(f), Ohio Admin. Code 3745–14–11(D) and Ohio Admin. Code 3745–15–06(C) are substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to these provisions. Also in this final action, the EPA is denying the Petition with respect to Ohio Admin. Code 3745–75–02(E), Ohio Admin. Code 3745–75–02(J), Ohio Admin. Code 3745–75–03(I), Ohio Admin. Code 3745–75–04(K) and Ohio Admin. Code 3745–75–04(L). This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Ohio SIP that the EPA received and considered during the development of this rulemaking.

G. Affected States in EPA Region VI

1. Arkansas

As described in section IX.G.1 of the February 2013 proposal, the Petitioner objected to two provisions in the Arkansas SIP. First, the Petitioner objected to a provision that provides an automatic exemption for excess emissions of VOC for sources located in Pulaski County that occur due to malfunctions (Reg. 19.1004(H)). Second, the Petitioner objected to a separate provision that provides a "complete affirmative defense" for excess emissions that occur during emergency conditions (Reg. 19.602). The Petitioner argued that this provision, which the state may have modeled after the EPA's title V regulations, is impermissible because its application is not clearly limited to operating permits.

For reasons explained in the February 2013 proposal, the EPA proposed to grant the Petition with respect to Reg. 19.1004(H) and Reg. 19.602.

Subsequently, for reasons explained fully in the SNPR, the EPA reproposed granting of the Petition with respect to the affirmative defense provision in Reg. 19.602, but it proposed to revise the basis for the finding of substantial inadequacy and the SIP call for this provision.

Consequently, the EPA proposed to find that Reg. 19.1004(H) and Reg. 19.602 [396] are substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to these provisions.

In this final action, the EPA is granting the Petition with respect to Reg. 19.1004(H) and Reg. 19.602. Accordingly, the EPA is finding that these provisions are substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to these provisions. This action is fully consistent with what the EPA proposed in February 2013 as revised in the SNPR. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Arkansas SIP that the EPA received and considered during the development of this rulemaking.

2. Louisiana

As described in section IX.G.2 of the February 2013 proposal, the Petitioner objected to several provisions in the Louisiana SIP that allow for automatic and discretionary exemptions from SIP emission limitations during various situations, including startup, shutdown, maintenance and malfunctions. First, the Petitioner objected to provisions that provide automatic exemptions for excess emissions of VOC from wastewater tanks (LAC 33:III.2153(B)(1)(i)) and excess emissions of NO_X from certain sources within the Baton Rouge Nonattainment Area (LAC 33:III.2201(C)(8)). The LAC 33:III.2153(B)(1)(i) provides that control devices "shall not be required" to meet emission limitations "during periods of malfunction and maintenance on the devices for periods not to exceed 336 hours per year." Similarly, LAC 33:III.2201(C)(8) provides that certain sources "are exempted" from emission limitations "during start-up and shutdown . . . or during a malfunction." Second, the Petitioner objected to provisions that provide discretionary exemptions to various emission limitations. Three of these provisions provide discretionary exemptions from otherwise applicable SO_2 and visible emission limitations in the Louisiana SIP for excess emissions that occur during certain startup and shutdown events (LAC 33:III.1107, LAC 33:III.1507(A)(1) and LAC 33:III.1507(B)(1)), while the other two provide such exemptions for excess emissions from nitric acid plants during startups and "upsets" (LAC 33:III.2307(C)(1)(a) and LAC 33:III.2307(C)(2)(a)).

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to LAC 33:III.2153(B)(1)(i) and LAC 33:III.2201(C)(8) on the basis that these provisions allow for automatic exemptions for excess emissions from otherwise applicable SIP emission limitations. Also for reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to LAC 33:III.1107(A), LAC 33:III.1507(A)(1), LAC 33:III.1507(B)(1), LAC 33:III.2307(C)(1)(a) and LAC 33:III.2307(C)(2)(a) on the basis that

[396] In a final action published March 4, 2015 (80 FR 11573), the EPA approved revisions of the Arkansas SIP pertaining to the regulation and permitting of $PM_{2.5}$. Among the approved revisions was a change to Reg. 19.602, to capitalize the letter "C" in that regulation's title, "Emergency Conditions"). To the extent the EPA's recent action affected Reg. 19.602, that action was only a ministerial matter and should not be construed as reapproval of the provision on its merits. That action does not affect the basis on which the EPA proposed to find Reg. 19.602 substantially inadequate in the February 2013 proposal.

issuing a SIP call with respect to these provisions. This action is fully consistent with what the EPA proposed in the SNPR. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Texas SIP that the EPA received and considered during the development of this rulemaking.

H. Affected States in EPA Region VII

1. Iowa

As described in section IX.H.1 of the February 2013 proposal, the Petitioner objected to a specific provision in the Iowa SIP that allows for automatic exemptions from otherwise applicable SIP emission limitations during periods of startup, shutdown or cleaning of control equipment (Iowa Admin. Code r. 567–24.1(1)). Also, the Petitioner objected to a provision that empowers the state to exercise enforcement discretion for violations of the otherwise applicable SIP emission limitations during malfunction periods (Iowa Admin. Code r. 567–24.1(4)).

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to Iowa Admin. Code r. 567–24.1(1) on the basis that this provision allows for exemptions from the otherwise applicable SIP emission limitations. Also for reasons explained fully in the February 2013 proposal, the EPA proposed to deny the Petition with respect to Iowa Admin. Code r. 567–24.1(4) on the basis that the provision is on its face clearly applicable only to Iowa state enforcement personnel and that the provision thus could not reasonably be read by a court to foreclose enforcement by the EPA or through a citizen suit where Iowa state personnel elect to exercise enforcement discretion.

Consequently, the EPA proposed to find that Iowa Admin. Code r. 567–24.1(1) is substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to this provision.

In this final action, the EPA is granting the Petition with respect to Iowa Admin. Code r. 567–24.1(1). Accordingly, the EPA is finding that this provision is substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to this provision. Also in this final action, the EPA is denying the Petition with respect to Iowa Admin. Code r. 567–24.1(4). This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Iowa SIP that the EPA received and considered during the development of this rulemaking.

2. Kansas

As described in section IX.H.2 of the February 2013 proposal, the Petitioner objected to three provisions in the Kansas SIP that allow for exemptions for excess emissions during malfunctions and necessary repairs (K.A.R. § 28–19–11(A)), scheduled maintenance (K.A.R. § 28–19–11(B)), and certain routine modes of operation (K.A.R. § 28–19–11(C)).

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to K.A.R. § 28–19–11(A), K.A.R. § 28–19–11(B) and K.A.R. § 28–19–11(C).

Consequently, the EPA proposed to find that K.A.R. § 28–19–11(A), K.A.R. § 28–19–11(B) and K.A.R. § 28–19–11(C) are substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to these provisions.

In this final action, the EPA is granting the Petition with respect to K.A.R. § 28–19–11(A), K.A.R. § 28–19–11(B) and K.A.R. § 28–19–11(C). Accordingly, the EPA is finding that these provisions are substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to these provisions. This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Kansas SIP that the EPA received and considered during the development of this rulemaking.

3. Missouri

As described in section IX.H.3 of the February 2013 proposal, the Petitioner objected to two provisions in the Missouri SIP that could be interpreted to provide discretionary exemptions. The first provides exemptions for visible emissions exceeding otherwise applicable SIP opacity limitations (Mo. Code Regs. Ann. tit 10, § 10–6.220(3)(C)). The second provides authorization to state personnel to decide whether excess emissions "warrant enforcement action" where a source submits information to the state showing that such emissions were "the consequence of a malfunction, start-up or shutdown." (Mo. Code Regs. Ann. tit 10, § 10–6.050(3)(C)).

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to Mo. Code Regs. Ann. tit 10, § 10–6.220(3)(C) on the basis that this provision could be read to allow for exemptions from the otherwise applicable SIP emission limitations through a state official's unilateral exercise of discretionary authority that is insufficiently bounded and includes no additional public process at the state or federal level. Also for reasons explained fully in the February 2013 proposal, the EPA proposed to deny the Petition with respect to Mo. Code Regs. Ann. tit 10, § 10–6.050(3)(C) on the basis that the provision is on its face clearly applicable only to Missouri state enforcement personnel and that the provision thus could not reasonably be read by a court to foreclose enforcement by the EPA or through a citizen suit where Missouri state personnel elect to exercise enforcement discretion.

Consequently, the EPA proposed to find that the provision in Mo. Code Regs. Ann. tit 10, § 10–6.220(3)(C) is substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to this provision.

In this final action, the EPA is granting the Petition with respect to Mo. Code Regs. Ann. tit 10, § 10–6.220(3)(C). Accordingly, the EPA is finding that this provision is substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to this provision. Also in this final action, the EPA is denying the Petition with respect to Mo. Code Regs. Ann. tit 10, § 10–6.050(3)(C). This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Missouri SIP that the EPA received and considered during the development of this rulemaking.

4. Nebraska

As described in section IX.H.4 of the February 2013 proposal, the Petitioner objected to two provisions in the Nebraska SIP. First, the Petitioner objected to a generally applicable provision that provides authorization to state personnel to decide whether excess emissions "warrant enforcement action" where a source submits information to the state showing that such emissions were "the result of a malfunction, start-up or shutdown" (Neb. Admin. Code Title 129 § 11–35.001). Second, the Petitioner objected to a specific provision in Nebraska state law that contains exemptions for excess emissions at hospital/medical/infectious

provision to which the Petitioner cited but did not explicitly object, N.D. Admin. Code 33–15–03–04.3 (cited in the Petition as N.D. Admin. Code § 33–15–03–04(3)). Also for reasons explained in the February 2013 proposal, the EPA proposed to grant the Petition with respect to N.D. Admin. Code 33–15–05–01.2a(1) (cited in the Petition as N.D. Admin. Code § 33–15–05–01(2)(a)(1)).

Subsequently, the state of North Dakota removed N.D. Admin. Code 33–15–03–04.4 and N.D. Admin. Code 33–15–05–01.2.a(1) and eliminated the SIP inadequacies with respect to those two of the three provisions identified in the February 2013 proposal notice. The EPA has already approved the necessary SIP revisions for those two provisions.[397] Thus, the EPA's final action on the Petition does not need to include a finding of substantial inadequacy and SIP call for those two provisions.

In this final action, the EPA is granting the Petition with respect to N.D. Admin. Code 33–15–03–04.3 and denying the Petition with respect to N.D. Admin. Code 33–15–03–04.4 and N.D. Admin. Code 33–15–05–01.2.a(1). Accordingly, the EPA is finding that the provision in N.D. Admin. Code 33–15–03–04.3 is substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call to North Dakota to correct its SIP with respect to this provision. This action is fully consistent with what the EPA proposed in February 2013 with respect to this provision. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the North Dakota SIP that the EPA received and considered during the development of this rulemaking.

4. South Dakota

As described in section IX.I.4 of the February 2013 proposal, the Petitioner objected to a provision in the South Dakota SIP that creates exemptions from otherwise applicable SIP emission limitations (S.D. Admin, R. 74:36:12:02(3)). The Petitioner asserted that the provision imposes visible emission limitations on sources but explicitly excludes emissions that occur "for brief periods during such operations as soot blowing, start-up, shut-down, and malfunctions."

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to S.D. Admin, R. 74:36:12:02(3). Consequently, the EPA proposed to find that S.D. Admin, R. 74:36:12:02(3) is substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to this provision.

In this final action, the EPA is granting the Petition with respect to S.D. Admin, R. 74:36:12:02(3). Accordingly, the EPA is finding that S.D. Admin, R. 74:36:12:02(3) is substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to this provision. This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the South Dakota SIP that the EPA received and considered during the development of this rulemaking.

5. Wyoming

As described in section IX.I.5 of the February 2013 proposal, the Petitioner objected to a specific provision in the Wyoming SIP that provides an exemption for excess PM emissions from diesel engines during startup, malfunction and maintenance (WAQSR Chapter 3, section 2(d), cited as ENV–AQ–1 Wyo. Code R. § 2(d) in the Petition). The provision exempts emission of visible air pollutants from diesel engines from applicable SIP limitations "during a reasonable period of warmup following a cold start or where undergoing repairs and adjustment following malfunction."

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to WAQSR Chapter 3, section 2(d) (cited as ENV–AQ–1 Wyo. Code R. § 2(d) in the Petition).

Subsequently, the state of Wyoming revised WAQSR Chapter 3, section 2(d) and eliminated the SIP inadequacies identified in the February 2013 proposal document with respect to this provision. The EPA has already approved the necessary SIP revision for this provision.[398] Thus, the EPA's final action on the Petition does not need to include a finding of substantial inadequacy and SIP call for this provision.

In this final action, the EPA is denying the Petition with respect to WAQSR Chapter 3, section 2(d). Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Wyoming SIP that the EPA received and considered during the development of this rulemaking.

J. Affected States and Local Jurisdictions in EPA Region IX

1. Arizona

As described in section IX.J.1 of the February 2013 proposal, the Petitioner objected to two provisions in the Arizona Department of Air Quality's (ADEQ) Rule R18–2–310, which provide affirmative defenses for excess emissions during malfunctions (AAC Section R18–2–310(B)) and for excess emissions during startup or shutdown (AAC Section R18–2–310(C)).

For reasons explained in the February 2013 proposal, the EPA proposed to deny the Petition with respect to AAC Section R18–2–310(B) on the basis that it included an affirmative defense applicable to malfunction events that was consistent with the CAA as interpreted by the EPA in the 1999 SSM Guidance.

Also for reasons explained in the February 2013 proposal, the EPA proposed to grant the Petition with respect to AAC Section R18–2–310(C).

Subsequently, for reasons explained fully in the SNPR, the EPA reversed its prior proposed denial of the Petition with respect to the affirmative defense provision AAC Section R18–2–310(B) applicable to malfunctions. Also for reasons explained in the SNPR, the EPA reproposed granting of the Petition with respect to the affirmative defense provision in AAC Section R18–2–310(C) applicable to startup and shutdown, but it proposed to revise the basis for the finding of substantial inadequacy and the SIP call for this provision.

Consequently, the EPA proposed to find that the provisions in AAC Section R18–2–310(B) and AAC Section R18–2–310(C) are substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to these provisions.

In this final action, the EPA is granting the Petition with respect to AAC Section R18–2–310(B) and AAC Section R18–2–310(C). Accordingly, the EPA is finding that the provisions in AAC Section R18–2–310(B) and AAC Section R18–2–310(C) are substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to these provisions. This action is fully consistent with what the EPA proposed in February 2013 as revised in the SNPR. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments

[397] *See* "Approval and Promulgation of Implementation Plans; North Dakota; Revisions to the Air Pollution Control Rules," 79 FR 63045 (October 22, 2014).

[398] *See* "Approval and Promulgation of Implementation Plans; Wyoming; Revisions to the Air Quality Standards and Regulations," 79 FR 62859 (October 21, 2014).

Breakdown"; (ii) Kern County "Rule 111 Equipment Breakdown"; (iii) Kings County "Rule 111 Equipment Breakdown"; (iv) Madera County "Rule 113 Equipment Breakdown"; (v) Stanislaus County "Rule 110 Equipment Breakdown"; and (vi) Tulare County "Rule 111 Equipment Breakdown." Each of these SIP provisions provides an affirmative defense available to sources for excess emissions that occur during a breakdown condition (*i.e.,* malfunction).

In this final action, the EPA is finding that the following six provisions in the California SIP applicable in the San Joaquin Valley Unified APCD are substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to these provisions: (i) Fresno County "Rule 110 Equipment Breakdown"; (ii) Kern County "Rule 111 Equipment Breakdown"; (iii) Kings County "Rule 111 Equipment Breakdown"; (iv) Madera County "Rule 113 Equipment Breakdown"; (v) Stanislaus County "Rule 110 Equipment Breakdown"; and (vi) Tulare County "Rule 111 Equipment Breakdown." [400] This action is fully consistent with what the EPA proposed in the SNPR. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the California SIP that the EPA received and considered during the development of this rulemaking.

K. Affected States in EPA Region X

1. Alaska

As described in section IX.K.1 of the February 2013 proposal, the Petitioner objected to a provision in the Alaska SIP that provides an excuse for "unavoidable" excess emissions that occur during SSM events, including startup, shutdown, scheduled maintenance and "upsets" (Alaska Admin. Code tit. 18 § 50.240). The provision provides: "Excess emissions determined to be unavoidable under this section will be excused and are not subject to penalty. This section does not limit the department's power to enjoin the emission or require corrective action." The Petitioner also stated that the provision is worded as if it were an affirmative defense but it uses criteria for enforcement discretion.

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to Alaska Admin. Code tit. 18 § 50.240 on the basis that, to the extent the provision was intended to be an affirmative defense, it was not a permissible affirmative defense provision consistent with the requirements of the CAA as interpreted in the EPA's 1999 SSM Guidance.

Subsequently, for reasons explained in the SNPR, the EPA reproposed granting of the Petition with respect to Alaska Admin. Code tit. 18 § 50.240, but it proposed to revise the basis for the finding of substantial inadequacy and the SIP call for this provision.

Consequently, the EPA proposed to find that Alaska Admin. Code tit. 18 § 50.240 is substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to this provision.

In this final action, the EPA is granting the Petition with respect to Alaska Admin. Code tit. 18 § 50.240. Accordingly, the EPA is finding that this provision is substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to this provision. This action is fully consistent with what the EPA proposed in February 2013 as revised in the SNPR. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Alaska SIP that the EPA received and considered during the development of this rulemaking.

2. Idaho

As described in section IX.K.2 of the February 2013 proposal, the Petitioner objected to a provision in the Idaho SIP that appears to grant enforcement discretion to the state as to whether to impose penalties for excess emissions during certain SSM events (Idaho Admin. Code r. 58.01.01.131).

For reasons explained fully in the February 2013 proposal, the EPA proposed to deny the Petition with respect to Idaho Admin. Code r. 58.01.01.131.

In this final action, the EPA is denying the Petition with respect to Idaho Admin. Code r. 58.01.01.131. This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Idaho SIP that the EPA received and considered during the development of this rulemaking.

3. Oregon

As described in section IX.K.3 of the February 2013 proposal, the Petitioner objected to a provision in the Oregon SIP that grants enforcement discretion to the state to pursue violations for excess emissions during certain SSM events (Or. Admin. R. 340–028–1450).

For reasons explained fully in the February 2013 proposal, the EPA proposed to deny the Petition with respect to Or. Admin. R. 340–028–1450.

In this final action, the EPA is denying the Petition with respect to Or. Admin. R. 340–028–1450. This action is fully consistent with what the EPA proposed in February 2013. Please refer to the Response to Comment document available in the docket for this rulemaking concerning any comments specific to the Oregon SIP that the EPA received and considered during the development of this rulemaking.

4. Washington

As described in section IX.K.4 of the February 2013 proposal, the Petitioner objected to a provision in the Washington SIP that provides an excuse for "unavoidable" excess emissions that occur during certain SSM events, including startup, shutdown, scheduled maintenance and "upsets" (Wash. Admin. Code § 173–400–107). The provision provides that "[e]xcess emissions determined to be unavoidable under the procedures and criteria under this section shall be excused and are not subject to penalty." The Petitioner argued that this provision excuses excess emissions in violation of the CAA and the EPA's SSM Policy, which require all such emissions to be treated as violations of the applicable SIP emission limitations. The Petitioner also stated that the provision is worded as if it were an affirmative defense but it uses criteria for enforcement discretion.

For reasons explained fully in the February 2013 proposal, the EPA proposed to grant the Petition with respect to Wash. Admin. Code § 173–400–107 on the basis that, to the extent the provision was intended to be an affirmative defense, it was not a permissible affirmative defense provision consistent with the requirements of the CAA as interpreted in the EPA's 1999 SSM Guidance.

Subsequently, for reasons explained in the SNPR, the EPA reproposed granting of the Petition with respect to Wash. Admin. Code § 173–400–107, but it proposed to revise the basis for the finding of substantial inadequacy and the SIP call for this provision.

Consequently, the EPA proposed to find that Wash. Admin. Code § 173–400–107 is substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to this provision.

[400] The EPA is in this final action making a finding of substantial inadequacy and issuing a SIP call for Kern County Rule 111 Equipment Breakdown in the California SIP as it applies in each the Eastern Kern APCD and the San Joaquin Valley Unified APCD.

the most legally and practically enforceable SIP requirements.[402] However, the EPA recognizes that for some source categories, under some circumstances, it may be appropriate for the SIP emission limitation to include a specific technological control requirement or specific work practice requirement that applies during specified modes of source operation such as startup and shutdown. For example, if the otherwise applicable numerical SO_2 emission limitation in the SIP is not achievable, and the otherwise required SO_2 control measure is not effective during startup and shutdown and/or measurement of emissions during startup and shutdown is not reasonably feasible, then it may be appropriate for that emission limitation to impose a different control measure, such as use of low sulfur coal, applicable during defined periods of startup and shutdown in lieu of a numerically expressed emission limitation. Such an approach can be consistent with SIP requirements, so long as that alternative control measure applicable during startup and shutdown is properly established and is legally and practically enforceable as a component of the emission limitation, and so long as other overarching CAA requirements are also met.

Fourth, the EPA notes that revisions to replace existing automatic or discretionary exemptions for SSM events with alternative emission limitations applicable during startup and shutdown also need to meet the applicable overarching CAA requirements with respect to the SIP emission limitation at issue. For example, if the emission limitation is in the SIP to meet the requirement that the source category be subject to RACT level controls for NO_X for purposes of the ozone NAAQS, then the state should assure that the higher numerical level or other control measure that will apply to NO_X emissions during startup and shutdown does constitute a RACT level of control for such sources for such pollutant during such modes of operation.

Finally, the EPA notes that states should not replace automatic or discretionary exemptions for excess emissions during SSM events with alternative emission limitations that are a generic requirement such as a "general duty to minimize emissions" provision or an "exercise good engineering judgment" provision.[403] While such provisions may serve an overarching purpose of encouraging sources to design, maintain and operate their sources correctly, such generic clauses are not a valid substitute for more specific emission limitations that apply during normal modes of operation such as startup and shutdown.

B. Recommendations for Compliance With Section 110(l) and Section 193 for SIP Revisions

In response to a SIP call for any type of deficient provision, the EPA anticipates that each state will determine the best way to revise its SIP provisions to bring them into compliance with CAA requirements. In this action the EPA is only identifying the provisions that need to be revised because they violate fundamental requirements of the CAA and providing guidance to states in the SSM Policy concerning the types of provisions that are and are not permissible with respect to the treatment of excess emissions during SSM events. The EPA recognizes that one important consideration for air agencies as they evaluate how best to revise their SIP provisions in response to this SIP call is the nature of the analysis that will be necessary for the resulting SIP revisions under section 110(l) and section 193. The EPA is therefore providing in this document general guidance on this important issue in order to assist states with SIP revisions in response to the SIP call.

Section 110(k)(3) directs the EPA to approve SIP submissions that comply with applicable CAA requirements and to disapprove those that do not. Under section 110(l), the EPA is prohibited from approving any SIP revision that would interfere with any applicable requirement concerning attainment and reasonable further progress or any other requirements of the CAA. To illustrate different ways in which section 110(l) and section 193 may apply in the evaluation of future SIP submissions in response to the SIP call, the EPA anticipates that there are several common scenarios that states may wish to consider when revising their SIPs:

Example 1: A state elects to revise an existing SIP provision by removing an existing automatic exemption provision, director's discretion provision, enforcement discretion provision or affirmative defense provision, without altering any other aspects of the SIP provision at issue (*e.g.*, elects to retain the emission limitation for the source category but eliminate the exemption for emissions during SSM events). Although the EPA must review each SIP submission for compliance with section 110(l) and section 193 on the facts and circumstances of the revision, the Agency believes in general that this type of SIP revision should not entail a complicated analysis to meet these statutory requirements. Presumably, removal of the impermissible components of preexisting SIP provisions would not constitute backsliding, would in fact strengthen the SIP and would be consistent with the overarching requirement that the SIP revision be consistent with the requirements of the CAA. Accordingly, the EPA believes that this type of SIP revision should not entail a complicated analysis for purposes of section 110(l). If the SIP revision is also governed by section 193, then elimination of the deficiency will likewise presumably result in equal or greater emission reductions and thus comply with section 193 without the need for a more complicated analysis. The EPA has recently evaluated a SIP revision to remove specific SSM deficiencies in this manner.[404]

Example 2: A state elects to revise its SIP provision by replacing an automatic exemption for excess emissions during startup and shutdown events with an appropriate alternative emission limitation (*e.g.*, a different numerical limitation or different other control requirement) that is explicitly applicable during startup and shutdown as a component of the revised emission limitation. Although the EPA must review each SIP revision for compliance with section 110(l) and section 193 on the facts and circumstances of the revision, the Agency believes in general that this type of SIP revision should not entail a complicated analysis to meet these statutory requirements. Presumably, the replacement of an automatic exemption applicable to startup and shutdown with an appropriate alternative emission limitation would not constitute backsliding, would strengthen the SIP and would be consistent with the overarching requirement that the SIP revision be consistent with the

[402] The EPA notes that in the CAA there is a presumption in favor of numerical emission limitations for purposes of section 112 and section 169, but section 110(a) does not include such an explicit presumption. However, there may be sources for which a numerically expressed emission limitation is the one that is most legally and practically enforceable, even during startup and shutdown, and for which a numerically expressed emission limitation is thus most appropriate.

[403] The EPA notes that the "general duty" imposed under CAA section 112(r) is a separate standard, in addition to the otherwise applicable emission limitations and is not in lieu of those requirements.

[404] *See* "Approval and Promulgation of Implementation Plans; Kentucky; Approval of Revisions to the Jefferson County Portion of the Kentucky SIP; Emissions During Startups, Shutdowns, and Malfunctions," proposed at 78 FR 29683 (May 21, 2013), finalized at 79 FR 33101 (June 10, 2014).

that are not necessarily in numeric format.

The term *automatic exemption* means a generally applicable provision in a SIP that would provide that if certain conditions existed during a period of excess emissions, then those exceedances would not be considered violations of the applicable emission limitations.

The term *director's discretion provision* means, in general, a regulatory provision that authorizes a state regulatory official unilaterally to grant exemptions or variances from otherwise applicable emission limitations or control measures, or to excuse noncompliance with otherwise applicable emission limitations or control measures, which would be binding on the EPA and the public.

The term *emission limitation* means, in the context of a SIP, a legally binding restriction on emissions from a source or source category, such as a numerical emission limitation, a numerical emission limitation with higher or lower levels applicable during specific modes of source operation, a specific technological control measure requirement, a work practice standard, or a combination of these things as components of a comprehensive and continuous emission limitation in a SIP provision. In this respect, the term *emission limitation* is defined as in section 302(k) of the CAA. By definition, an emission limitation can take various forms or a combination of forms, but in order to be permissible in a SIP it must be applicable to the source continuously, *i.e.,* cannot include periods during which emissions from the source are legally or functionally exempt from regulation. Regardless of its form, a fully approvable SIP emission limitation must also meet all substantive requirements of the CAA applicable to such a SIP provision, *e.g.,* the statutory requirement of section 172(c)(1) for imposition of reasonably available control measures and reasonably available control technology (RACM and RACT) on sources located in designated nonattainment areas.

The term *excess emissions* means the emissions of air pollutants from a source that exceed any applicable SIP emission limitation. In particular, this term includes those emissions above the otherwise applicable SIP emission limitation that occur during startup, shutdown, malfunction or other modes of source operation, *i.e.,* emissions that would be considered violations of the applicable emission limitation but for an impermissible automatic or discretionary exemption from such emission limitation.

The term *malfunction* means a sudden and unavoidable breakdown of process or control equipment.

The term *shutdown* means, generally, the cessation of operation of a source for any reason. In this document, the EPA uses this term in the generic sense. In individual SIP provisions it may be appropriate to include a specifically tailored definition of this term to address a particular source category for a particular purpose.

The term *SSM* refers to startup, shutdown or malfunction at a source. It does not include periods of maintenance at such a source. An SSM event is a period of startup, shutdown or malfunction during which there are exceedances of the applicable emission limitations and thus excess emissions.

The term *startup* means, generally, the setting in operation of a source for any reason. In this document, the EPA uses this term in the generic sense. In an individual SIP provision it may be appropriate to include a specifically tailored definition of this term to address a particular source category for a particular purpose.

B. Emission Limitations in SIPs Must Apply Continuously During All Modes of Operation, Without Automatic or Discretionary Exemptions or Overly Broad Enforcement Discretion Provisions That Would Bar Enforcement by the EPA or by Other Parties in Federal Court Through a Citizen Suit

In accordance with CAA section 302(k), SIPs must contain emission limitations that "limit the quantity, rate, or concentration of emissions of air pollutants on a continuous basis." All of the specific requirements of a SIP emission limitation must be discernible in the SIP, for clarity preferably within a single section or provision; must meet the applicable substantive and stringency requirements of the CAA; and must be legally and practically enforceable.

To the extent that a SIP provision allows any period of time when a source is *not* subject to any requirement that limits emissions, the requirements limiting the source's emissions by definition cannot do so "on a continuous basis." Such a source would not be subject to an "emission limitation," as required by the definition of that term under section 302(k). However, the CAA allows SIP provisions that include numerical limitations, specific technological control requirements and/or work practice requirements that limit emissions during startup and shutdown as components of a continuously applicable emission limitation, as discussed in section XI.C of this document.

Accordingly, automatic or discretionary exemption provisions applicable during SSM events are impermissible in SIPs. This impermissibility applies even for "brief" exemptions from limits on emissions, because such exemptions nevertheless render the limitation noncontinuous. Furthermore, the fact that a SIP provision includes prerequisites to qualifying for an SSM exemption does not mean those prerequisites are themselves an "alternative emission limitation" applicable during SSM events.

Automatic exemptions. A typical SIP provision that includes an impermissible automatic exemption would provide that a source has to meet a specific emission limitation during all modes of operation except startup, shutdown and malfunction; by definition any excess emissions during such events would not be violations and thus there could be no enforcement based on those excess emissions. With respect to automatic exemptions from emission limitations in SIPs, the EPA's longstanding interpretation of the CAA is that such exemptions are impermissible because they are inconsistent with the fundamental requirements of the CAA. Automatic exemptions from otherwise applicable emission limitations render those emission limitations less than continuous as required by CAA sections 302(k), 110(a)(2)(A) and 110(a)(2)(C), thereby inconsistent with a fundamental requirement of the CAA and thus substantially inadequate as contemplated in CAA section 110(k)(5).

Discretionary exemptions. A typical SIP provision that includes an impermissible "director's discretion" component would purport to authorize air agency personnel to modify existing SIP requirements under certain conditions, *e.g.,* to grant a variance from an otherwise applicable emission limitation if the source could not meet the requirement in certain circumstances.[406] Director's discretion provisions operate to allow air agency personnel to make unilateral decisions on an *ad hoc* basis, up to and including the granting of complete exemptions for

[406] The EPA notes that problematic "director's discretion" provisions are not limited only to those that purport to authorize alternative emission limitations from those required in a SIP. Other problematic director's discretion provisions include those that purport to provide for discretionary changes to other substantive requirements of the SIP, such as applicability, operating requirements, recordkeeping requirements, monitoring requirements, test methods or alternative compliance methods.

limitation as a whole is expressed numerically or as a combination of numerical limitations, specific control technology requirements and/or work practice requirements applicable during specific modes of operation, and regardless of whether the emission limitation is static or variable. Thus, emission limitations in SIP provisions do not have to be composed solely of numerical emission limitations applicable at all times. For example, so long as the SIP provision meets other applicable requirements, it may impose different numerical limitations for startup and shutdown. Also, for example, SIPs can contain numerical emission limitations applicable only to some periods and other forms of controls applicable only to some periods, with certain periods perhaps subject to both types of limitation. Thus, SIP emission limitations: (i) Do not need to be numerical in format; (ii) do not have to apply the same limitation (*e.g.*, numerical level) at all times; and (iii) may be composed of a combination of numerical limitations, specific technological control requirements and/or work practice requirements, with each component of the emission limitation applicable during a defined mode of source operation. In practice, it may be that numerical emission limitations are the most appropriate from a regulatory perspective (*e.g.*, to be legally and practically enforceable) and thus the emission limitation would need to be established in this form to meet CAA requirements. It is important to emphasize, however, that regardless of how the state structures or expresses a SIP emission limitation—whether solely as one numerical limitation, as a combination of different numerical limitations or as a combination of numerical limitations, specific technological control requirements and/or work practice requirements that apply during certain modes of operation such as startup and shutdown—the emission limitation as a whole must be continuous, must meet applicable CAA stringency requirements and must be legally and practically enforceable.[408]

Startup and shutdown are part of the normal operation of a source and should be accounted for in the design and operation of the source.[409] It should be possible to determine an appropriate form and degree of emission control during startup and shutdown and to achieve that control on a regular basis. Thus, sources should be required to meet defined SIP emission limitations during startup and shutdown. However, the EPA interprets the CAA to permit SIP emission limitations that include alternative emission limitations specifically applicable during startup and shutdown. Regarding startup and shutdown periods, the EPA considers the following to be the correct approach to creating an emission limitation: (i) The emission limitation contains no exemption for emissions during SSM events; (ii) the component of any alternative emission limitation that applies during startup and shutdown is clearly stated and obviously is an emission limitation that applies to the source; (iii) the component of any alternative emission limitation that applies during startup and shutdown meets the applicable stringency level for this type of emission limitation; and (iv) the emission limitation contains requirements to make it legally and practically enforceable. Section XI.D of this document contains more specific recommendations to states for developing alternative emission limitations.

In contrast to startup and shutdown, a malfunction is unpredictable as to the timing of the start of the malfunction event, its duration and its exact nature. The effect of a malfunction on emissions is therefore unpredictable and variable, making the development of an alternative emission limitation for malfunctions problematic. There may be rare instances in which certain types of malfunctions at certain types of sources are foreseeable and foreseen and thus are an expected mode of source operation. In such circumstances, the EPA believes that sources should be expected to meet the otherwise applicable emission limitation in order to encourage sources to be properly designed, maintained and operated in order to prevent or minimize any such malfunctions. To the extent that a given type of malfunction is so foreseeable and foreseen that a state considers it a normal mode of operation that is appropriate for a specifically designed alternative emission limitation, then such alternative should be developed in accordance with the recommended criteria for alternative emission limitations. The EPA does not believe that generic general-duty provisions, such as a general duty to minimize emissions, is sufficient as an alternative emission limitation for any type of event including malfunctions.

States developing SIP revisions to remove impermissible exemption provisions from emissions limitations may choose to consider reassessing particular emission limitations, for example to determine whether limits originally applicable only during non-SSM periods can be revised such that well-managed emissions during planned operations such as startup and shutdown would not exceed the revised emission limitation, while still protecting air quality and meeting other applicable CAA requirements. Such a revision of an emission limitation will need to be submitted as a SIP revision for EPA approval if the existing limitation to be changed is already included in the SIP or if the existing SIP relies on the particular existing emission limitation to meet a CAA requirement.

Some SIPs contain other generic regulatory requirements frequently referred to as "general duty" type requirements, such as a general duty to minimize emissions at all times, a general duty to use good engineering judgment at all times or a general duty not to cause a violation of the NAAQS at any time. To the extent that such other general-duty requirement is properly established and legally and practically enforceable, the EPA would agree that it may be an appropriate separate requirement to impose upon sources in addition to the (continuous) emission limitation. The EPA itself imposes separate general duties of this type in appropriate circumstances. The existence of these generic provisions does not, however, legitimize exemptions for emissions during SSM events in a SIP provision that imposes an emission limitation.

General-duty requirements that are not clearly part of or explicitly cross-referenced in a SIP emission limitation cannot be viewed as a component of a continuous emission limitation. Even if clearly part of or explicitly cross-referenced in the SIP emission limitation, however, a given general-duty requirement may not be consistent with the applicable stringency requirements for SIP provisions that should apply during startup and

[408] The EPA notes that CAA section 123 explicitly prohibits certain intermittent or supplemental controls on sources. In a situation where an emission limitation is continuous, by virtue of the fact that it has components applicable during all modes of source operation, the EPA would not interpret the components that applied only during certain modes of operation, *e.g.*, startup and shutdown, to be prohibited intermittent or supplemental controls.

[409] Every source is designed, maintained and operated with the expectation that the source will at least occasionally start up and shut down, and thus these modes of operation are "normal" in the sense that they are to be expected. The EPA uses this term in the ordinary sense of the word to distinguish between such predictable modes of source operation and genuine "malfunctions," which are by definition supposed to be unpredictable and unforeseen events that could not have been precluded by proper source design, maintenance and operation.

enforcement authority. Under section 110(a)(2), states must have adequate authority to enforce provisions adopted into the SIP, but states can establish criteria for how they plan to exercise that authority. Such enforcement discretion provisions cannot, however, impinge upon the enforcement authority of the EPA or of others pursuant to the citizen suit provision of the CAA. Such enforcement discretion provisions in a SIP would be inconsistent with the enforcement structure provided in the CAA. Specifically, the statute provides explicit independent enforcement authority to the EPA under CAA section 113 and to citizens under CAA section 304. Thus, the CAA contemplates that the EPA and citizens have authority to pursue enforcement for a violation even if the state elects not to do so. The EPA and citizens, and any federal court in which they seek to pursue an enforcement claim for violation of SIP requirements, must retain the authority to evaluate independently whether a source's violation of an emission limitation warrants enforcement action. Potential for enforcement by the EPA or through a citizen suit provides an important safeguard in the event that the state lacks resources or ability to enforce violations and provides additional deterrence. Accordingly, a SIP provision that operates at the state's election to eliminate the authority of the EPA or the public to pursue enforcement actions in federal court would undermine the enforcement structure of the CAA and would thus be substantially inadequate to meet fundamental requirements of the CAA.

Also, states should not adopt overly broad enforcement discretion provisions for inclusion in their SIPs, even for their own personnel. Section 110(a)(2) requires states to have adequate enforcement authority, and overly broad enforcement discretion provisions would run afoul of this requirement if they have the effect of precluding adequate state authority to enforce SIP requirements. If such provisions are sufficiently specific, provide for sufficient public process and are sufficiently bounded, so that it is possible to anticipate at the time of the EPA's approval of the SIP provision how that provision will actually be applied and the potential adverse impacts thereof, then such a provision might meet basic CAA requirements. In essence, if it is possible to anticipate and evaluate in advance how the exercise of enforcement discretion could affect compliance with other CAA requirements, then it may be possible to determine in advance that the preauthorized exercise of director's discretion will not interfere with other CAA requirements, such as providing for attainment and maintenance of the NAAQS.

When using enforcement discretion in determining whether an enforcement action is appropriate in the case of excess emissions during a malfunction, satisfaction of the following criteria should be considered:

(1) To the maximum extent practicable the air pollution control equipment, process equipment or processes were maintained and operated in a manner consistent with good practice for minimizing emissions;

(2) Repairs were made in an expeditious fashion when the operator knew or should have known that applicable emission limitations were being exceeded. Off-shift labor and overtime were utilized, to the extent practicable, to ensure that such repairs were made as expeditiously as practicable;

(3) The amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions;

(4) All possible steps were taken to minimize the impact of the excess emissions on ambient air quality; and

(5) The excess emissions are not part of a recurring pattern indicative of inadequate design, operation or maintenance.

F. Affirmative Defense Provisions in SIPs

The EPA believes that SIP provisions that function to alter the jurisdiction or discretion of the federal courts under CAA section 113 and section 304 to determine liability and to impose remedies are inconsistent with fundamental legal requirements of the CAA, especially with respect to the enforcement regime explicitly created by statute. Affirmative defense provisions by their nature purport to limit or eliminate the authority of federal courts to find liability or to impose remedies through factual considerations that differ from, or are contrary to, the explicit grants of authority in section 113(b) and section 113(e). These provisions are not appropriate under the CAA, no matter what type of event they apply to, what criteria they contain or what forms of remedy they purport to limit or eliminate.

Section 113(b) provides courts with explicit jurisdiction to determine liability and to impose remedies of various kinds, including injunctive relief, compliance orders and monetary penalties, in judicial enforcement proceedings. This grant of jurisdiction comes directly from Congress, and the EPA is not authorized to alter or eliminate this jurisdiction under the CAA or any other law. With respect to monetary penalties, CAA section 113(e) explicitly includes the factors that federal courts and the EPA are required to consider in the event of judicial or administrative enforcement for violations of CAA requirements, including SIP provisions. Because Congress has already given federal courts the jurisdiction to determine what monetary penalties are appropriate in the event of judicial enforcement for a violation of a SIP provision, neither the EPA nor states can alter or eliminate that jurisdiction by superimposing restrictions on that jurisdiction and discretion granted by Congress to the courts. Accordingly, pursuant to section 110(k) and section 110(l), the EPA cannot approve any such affirmative defense provision in a SIP. If such an affirmative defense provision is included in an existing SIP, the EPA has authority under section 110(k)(5) to require a state to remove that provision.

Couching an affirmative defense provision in terms of merely defining whether the emission limitation applies and thus whether there is a "violation," as suggested by some commenters, is also problematic. If there is no "violation" when certain criteria or conditions for an "affirmative defense" are met, then there is in effect no emission limitation that applies when the criteria or conditions are met; the affirmative defense thus operates to create an exemption from the emission limitation. As explained in the February 2013 proposal, the CAA requires that emission limitations must apply continuously and cannot contain exemptions, conditional or otherwise. This interpretation is consistent with the decision in *Sierra Club* v. *Johnson* concerning the term "emission limitation" in section 302(k).[412] Characterizing the exemptions as an "affirmative defense" runs afoul of the requirement that emission limitations must apply continuously.

The EPA wishes to be clear that the absence of affirmative defense provisions in SIPs does not alter the legal rights of sources under the CAA. In the event of an enforcement action for an exceedance of a SIP emission limitation, a source can elect to assert any common law or statutory defenses that it determines are supported, based upon the facts and circumstances surrounding the alleged violation.

[412] 551 F.3d 1019 (D.C. Cir. 2008).

11. "Approval and Promulgation of Air Quality Implementation Plans; New Hampshire; Reasonably Available Control Technology Update To Address Control Techniques Guidelines Issued in 2006, 2007, and 2008; Direct final rule," 77 FR 66921 (November 8, 2012).
12. "Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; Redesignation, Maintenance Plan, and Emissions Inventories for Reading; Ozone Redesignations Policy Change; Final rule," 62 FR 24826 (May 7, 1997).
13. "Approval and Promulgation of Air Quality Implementation Plans; Utah; Redesignation Request and Maintenance Plan for Salt Lake County; Utah County; Ogden City PM_{10} Nonattainment Area; Proposed rule," 74 FR 62717 (December 1, 2009).
14. "Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; State of Arizona; Redesignation of Phoenix-Mesa Area to Attainment for the 1997 8-Hour Ozone Standard; Final rule," 79 FR 55645 (September 17, 2014).
15. "Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; Ohio; Redesignation of the Ohio Portion of the Huntington-Ashland 1997 Annual Fine Particulate Matter Nonattainment Area to Attainment; Final rule," 77 FR 76883 (December 31, 2012).
16. "Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; State of Arizona; Redesignation of the Phoenix-Mesa Nonattainment Area to Attainment for the 1997 8-Hour Ozone Standard; Proposed rule," 79 FR 16734 (March 26, 2014).
17. "Approval and Promulgation of Implementation Plans; Arkansas; Revisions for the Regulation and Permitting of Fine Particulate Matter; Final rule," 80 FR 11573 (March 4, 2015).
18. "Approval and Promulgation of Implementation Plans; Corrections to the Arizona and Nevada State Implementation Plans; Direct final rule," 74 FR 57051 (November 3, 2009), EPA–HQ–OAR–2012–0322–0018.
19. "Approval and Promulgation of Implementation Plans; Designation of Areas for Air Quality Planning Purposes; State of California; PM–10; Revision of Designation; Redesignation of the San Joaquin Valley Air Basin PM–10 Nonattainment Area to Attainment; Approval of PM–10 Maintenance Plan for the San Joaquin Valley Air Basin; Approval of Commitments for the East Kern PM–10 Nonattainment Area; Proposed rule," 73 FR 22307 (April 25, 2008).
20. "Approval and Promulgation of Implementation Plans; Kentucky; Approval of Revisions to the Jefferson County Portion of the Kentucky SIP; Emissions During Startups, Shutdowns, and Malfunctions," proposed at 78 FR 29683 (May 21, 2013) and finalized at 79 FR 33101 (June 10, 2014), EPA–HQ–OAR–2012–0322–0890.
21. "Approval and Promulgation of Implementation Plans; North Dakota; Revisions to the Air Pollution Control Rules; Final rule," 79 FR 63045 (October 22, 2014).
22. "Approval and Promulgation of Implementation Plans; Texas; Excess Emissions During Startup, Shutdown, Maintenance, and Malfunction Activities," 75 FR 68989 (November 10, 2010), EPA–HQ–OAR–2012–0322–0892.
23. "Approval and Promulgation of Implementation Plans; Texas; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Prevention of Significant Deterioration (PSD), Nonattainment NSR (NNSR) for the 1997 8-Hour Ozone Standard, NSR Reform, and a Standard Permit; Proposed rule," 74 FR 48467 (September 23, 2009).
24. "Approval and Promulgation of Implementation Plans; Wyoming; Revisions to the Air Quality Standards and Regulations," 79 FR 62859 (October 21, 2014).
25. "Approval and Promulgation of State Implementation Plans; Call for Sulfur Dioxide SIP Revisions for Billings/Laurel, MT [Montana]," 58 FR 41430 (August 4, 1993).
26. "Approval and Promulgation of State Implementation Plans; Michigan," 63 FR 8573 (February 20, 1998), EPA–HQ–OAR–2012–0322–0023.
27. *Arizona Public Service Co.* v. *EPA*, 562 F.3d 1116 (10th Cir. 2009).
28. *ATK Launch Systems, Inc.* v. *EPA*, 651 F.3d 1194 (10th Cir. 2011).
29. *Auer* v. *Robbins*, 519 U.S. 452 (1997).
30. CAA of 1970, Pub. L. 91–604, section 4(a), 84 Stat. 1676 (December 31, 1970).
31. *Catawba County, North Carolina* v. *EPA*, 571 F.3d 20 (D.C. Cir. 2009).
32. *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).
33. "Clean Air Act Full Approval of Partial Operating Permit Program; Allegheny County; Pennsylvania; Direct final rule," 66 FR 55112 (November 1, 2001), EPA–HQ–OAR–2012–0322–0020.
34. *Conn. Light & Power Co.* v. *NRC*, 673 F.2d 525 (D.C. Cir. 1982).
35. "Correction of Implementation Plans; American Samoa, Arizona, California, Hawaii, and Nevada State Implementation Plans; Notice of proposed rulemaking," 61 FR 38664 (July 25, 1996), EPA–HQ–OAR–2012–0322–0034, finalized at 62 FR 34641 (June 27, 1997), EPA–HQ–OAR–2012–0322–0035.
36. "Corrections to the California State Implementation Plan," 69 FR 67062 (November 16, 2004), EPA–HQ–OAR–2012–0322–0017.
37. "Credible Evidence Revisions; Final rule," 62 FR 8314 (February 24, 1997).
38. "Draft Emissions Inventory Guidance for Implementation of Ozone [and Particulate Matter]* National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations," April 11, 2014.
39. *EME Homer City Generation, L.P.* v. *EPA*, 696 F.3d 7 (D.C. Cir. 2012) *rev'd*, 134 S. Ct. 1584 (2014).
40. "Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations," Appendix B, August 2005, EPA–454/R–05–001.
41. "Federal Implementation Plan for the Billings/Laurel, MT [Montana], Sulfur Dioxide Area," 73 FR 21418 (April 21, 2008), EPA–HQ–OAR–2012–0322–0009.
42. *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502 (2009).
43. February 2013 proposal ("State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Proposed rule," 78 FR 12459, February 22, 2013), EPA–HQ–OAR–2012–0322–0055.
44. "Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone," 63 FR 57356 (October 27, 1998), EPA–HQ–OAR–2012–0322–0037.
45. "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision," 76 FR 21639 (April 18, 2011), EPA–HQ–OAR–2012–0322–0010.
46. "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision," 75 FR 70888 (November 19, 2010), EPA–HQ–OAR–2012–0322–0012.
47. "Finding of Substantial Inadequacy of Implementation Plan; Call for Iowa State Implementation Plan Revision," 76 FR 41424 (July 14, 2011).
48. "Finding of Substantial Inadequacy of Implementation Plan; Call for California State Implementation Plan Revision," 68 FR 37746 (June 25, 2003).
49. *Florida Power & Light Co.* v. *Costle*, 650 F.2d 579 (5th Cir. 1981).
50. *Florida Power & Light Co.* v. *United States*, 846 F.2d 765 (D.C. Cir. 1988).
51. "Guidance on the Use of Models and Other Analyses for Demonstrating Attainment of Air Quality Goals for Ozone, $PM_{2.5}$, and Regional Haze," April 2007, EPA–454/B–07–002.
52. "Guidelines for Estimating and Applying Rule Effectiveness for Ozone/CO State Implementation Plan Base Year Inventories," November 1992, EPA–4S2JR–92.010.
53. H. Rept. 101–490.
54. H.R. 95–294 (1977).
55. *Howmet Corp.* v. *EPA*, 614 F.3d 544 (D.C. Cir. 2010).
56. *Industrial Environmental Association* v. *Browner*, No. 97–71117 (9th Cir. May 26, 2000).
57. *Ky. Res Council* v. *EPA*, 467 F.3d 986 (6th Cir. 2006).
58. *Luminant Generation* v. *EPA*, 714 F.3d 841 (5th Cir. 2013) [EPA–HQ–OAR–2012–0322–0881], *cert. denied*, 134 S. Ct. 387 (2013).

will not impose any requirements on small entities. Instead, the action merely reiterates the EPA's interpretation of the statutory requirements of the CAA. Through the SIP calls issued to certain states as part of this SIP call action under CAA section 110(k)(5), the EPA is only requiring each affected state to revise its SIP to comply with existing requirements of the CAA. The EPA's action therefore leaves to each affected state the choice as to how to revise the SIP provision in question to make it consistent with CAA requirements and to determine, among other things, which of the several lawful approaches to the treatment of excess emissions during SSM events will be applied to particular sources.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any federal mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no new enforceable duty on any state, local or tribal governments or the private sector. The regulatory requirements of this action apply to certain states for which the EPA is issuing a SIP call. To the extent that such affected states allow local air districts or planning organizations to implement portions of the state's obligation under the CAA, the regulatory requirements of this action do not significantly or uniquely affect small governments because those governments have already undertaken the obligation to comply with the CAA.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. In this action, the EPA is not addressing any tribal implementation plans. This action is limited to states. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of "covered regulatory action" in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because, in prescribing the EPA's action for states regarding their obligations for SIPs under the CAA, it implements specific standards established by Congress in statutes.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use

This action is not a "significant energy action" because it is not likely to have a significant adverse effect on the supply, distribution or use of energy. This action merely prescribes the EPA's action for states regarding their obligations for SIPs under the CAA.

I. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes the human health or environmental risk addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations. The action is intended to ensure that all communities and populations across the affected states, including minority, low-income and indigenous populations overburdened by pollution, receive the full human health and environmental protection provided by the CAA. This action concerns states' obligations regarding the treatment they give, in rules included in their SIPs under the CAA, to excess emissions during startup, shutdown and malfunctions. This action requires that certain states bring their treatment of these emissions into line with CAA requirements, which will lead to certain sources' having greater incentives to control emissions during such events.

K. Determination Under Section 307(d)

Pursuant to CAA section 307(d)(1)(V), the Administrator determines that this action is subject to the provisions of section 307(d). Section 307(d) establishes procedural requirements specific to rulemaking under the CAA. Section 307(d)(1)(V) provides that the provisions of section 307(d) apply to "such other actions as the Administrator may determine."

L. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

XV. Judicial Review

The Administrator determines that this action is "nationally applicable" within the meaning of section 307(b)(1) of the CAA. This action in scope and effect extends to numerous judicial circuits because the action on the Petition extends to states throughout the country. In these circumstances, section 307(b)(1) and its legislative history authorize the Administrator to find the action to be of "nationwide scope or effect" and thus to indicate the venue for challenges to be in the D.C Circuit. Thus, any petitions for review must be filed in the U.S. Court of Appeals for the District of Columbia Circuit.

In addition, pursuant to CAA section 307(d)(1)(V), the EPA is determining that this rulemaking action is subject to the requirements of section 307(d), which establish procedural requirements specific to rulemaking under the CAA. In the event there is a judicial challenge to this action and a court determines that the EPA has erred with respect to any portion of this action, the EPA intends the components of this action to be severable.

XVI. Statutory Authority

The statutory authority for this action is provided by CAA section 101 *et seq.* (42 U.S.C. 7401 *et seq.*).

List of Subjects in 40 CFR Part 52

Environmental protection, Affirmative defense, Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Carbon monoxide, Excess emissions, Greenhouse gases, Hydrofluorocarbons, Incorporation by reference, Intergovernmental relations, Lead, Methane, Nitrogen dioxide, Nitrous oxide, Ozone, Particulate matter, Perfluorocarbons, Reporting and recordkeeping requirements, Startup, shutdown and malfunction, State implementation plan, Sulfur hexafluoride, Sulfur oxides, Volatile organic compounds.

Dated: May 22, 2015.

Gina McCarthy,

Administrator.

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Appendix A-2

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Part III

Environmental Protection Agency

40 CFR Part 52
State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–HQ–OAR–2012–0322; FRL–9782–2]

RIN 2060–AR68

State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to take action on a petition for rulemaking filed by the Sierra Club with the EPA Administrator on June 30, 2011 (the Petition). The Petition includes interrelated requests concerning the treatment of excess emissions in state rules by sources during periods of startup, shutdown, or malfunction (SSM). The EPA is proposing to grant in part and to deny in part the request in the Petition to rescind its policy interpreting the Clean Air Act (CAA) to allow states to have appropriately drawn state implementation plan (SIP) provisions that provide affirmative defenses to monetary penalties for violations during periods of SSM. The EPA is also proposing either to grant or to deny the Petition with respect to the specific existing SIP provisions related to SSM in each of 39 states identified by the Petitioner as inconsistent with the CAA. Further, for each of those states where the EPA proposes to grant the Petition concerning specific provisions, the EPA also proposes to find that the existing SIP provision is substantially inadequate to meet CAA requirements and thus under CAA authority proposes a "SIP call." For those states for which the EPA proposes a SIP call, the EPA also proposes a schedule for the states to submit a corrective SIP revision. Finally, the EPA is also proposing to deny the request in the Petition that the EPA discontinue reliance on interpretive letters from states to clarify any potential ambiguity in SIP submissions, even in circumstances where the EPA may determine that this approach is appropriate and has adequately documented that approach in a rulemaking action. This action reflects the EPA's current SSM Policy for SIPs.

DATES: *Comments.* Comments must be received on or before March 25, 2013.

Public Hearing. If anyone contacts the EPA requesting a public hearing by March 11, 2013, we will hold a public hearing on March 12, 2013.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2012–0322, by one of the following methods:

- *http://www.regulations.gov:* Follow the online instructions for submitting comments.
- *Email: a-and-r-docket@epa.gov.*
- *Fax:* (202) 566–9744.
- *Mail:* Attention Docket ID No. EPA–HQ–OAR–2012–0322, U.S. Environmental Protection Agency, EPA West (Air Docket), 1200 Pennsylvania Avenue NW., Mail Code: 6102T, Washington, DC 20460. Please include a total of two copies.
- *Hand Delivery:* U.S. Environmental Protection Agency, EPA West (Air Docket), 1301 Constitution Avenue Northwest, Room 3334, Washington, DC 20004, Attention Docket ID No. EPA–HQ–OAR–2012–0322. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions. Direct your comments to Docket ID No. EPA–HQ–OAR–2012–0322. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an "anonymous access" system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any CD you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, avoid any form of encryption, and be free of any defects or viruses. For additional information about the EPA's public docket visit the EPA Docket Center homepage at *www.epa.gov/epahome/dockets.htm.* For additional instructions on submitting comments, go to section I.C of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket. All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically at *www.regulations.gov* or in hard copy at the U.S. Environmental Protection Agency, Air Docket, EPA/DC, EPA West Building, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

Public Hearing: If a public hearing is held, it will be held on March 12, 2013, at the EPA Ariel Rios East building, Room 1153, 1301 Constitution Avenue, Washington, DC 20460. The public hearing will convene at 9 a.m. (Eastern Standard Time) and continue until the later of 6 p.m. or 1 hour after the last registered speaker has spoken. People interested in presenting oral testimony or inquiring as to whether a hearing is to be held should contact Ms. Pamela Long, Air Quality Planning Division, Office of Air Quality Planning and Standards (C504–01), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711, telephone (919) 541–0641, fax number (919) 541–5509, email address *long.pam@epa.gov,* at least 5 days in advance of the public hearing (*see* **DATES**). People interested in attending the public hearing must also call Ms. Long to verify the time, date, and location of the hearing. The public hearing will provide interested parties the opportunity to present data, views, or arguments concerning the proposed action. The EPA will make every effort to accommodate all speakers who arrive and register. A lunch break is scheduled from 12:30 p.m. until 2 p.m. Because this hearing is being held at U.S. government facilities, individuals planning to attend the hearing should be prepared to show valid picture identification to the security staff in order to gain access to the meeting room. In addition, you will need to

obtain a property pass for any personal belongings you bring with you. Upon leaving the building, you will be required to return this property pass to the security desk. No large signs will be allowed in the building, cameras may only be used outside of the building, and demonstrations will not be allowed on federal property for security reasons. The EPA may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral comments and supporting information presented at the public hearing. If a hearing is held on March 12, 2013, written comments on the proposed rule must be postmarked by April 11, 2013. Commenters should notify Ms. Long if they will need specific equipment, or if there are other special needs related to providing comments at the hearing. The EPA will provide equipment for commenters to show overhead slides or make computerized slide presentations if we receive special requests in advance. Oral testimony will be limited to 5 minutes for each commenter. The EPA encourages commenters to provide the EPA with a copy of their oral testimony electronically (via email or CD) or in hard copy form. The hearing schedule, including lists of speakers, will be posted on the EPA's Web site at *www.epa.gov/air/urbanair/sipstatus/*. Verbatim transcripts of the hearings and written statements will be included in the docket for the rulemaking. The EPA will make every effort to follow the schedule as closely as possible on the day of the hearing; however, please plan for the hearing to run either ahead of schedule or behind schedule.

FOR FURTHER INFORMATION CONTACT: If you have questions concerning the public hearing, please contact Ms. Pamela Long, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Air Quality Planning Division, (C504–01), Research Triangle Park, NC 27711, telephone (919) 541–0641, fax number (919) 541–5509, email address: *long.pam@epa.gov* (preferred method for registering). Questions concerning this proposed rule should be addressed to Ms. Lisa Sutton, U.S. EPA, Office of Air Quality Planning and Standards, State and Local Programs Group, (C539–01), Research Triangle Park, NC 27711, telephone number (919) 541–3450, email at *sutton.lisa@epa.gov*.

SUPPLEMENTARY INFORMATION: For questions related to a specific SIP, please contact the appropriate EPA Regional Office:

EPA regional office	Contact for regional office (person, mailing address, telephone No.)	State
I	Alison Simcox, Environmental Scientist, EPA Region 1, 5 Post Office Square, Suite 100, Boston, MA 02109–3912, (617) 918–1684.	Connecticut, Massachusetts, Maine, New Hampshire, Rhode Island, and Vermont.
II	Paul Truchan, EPA Region 2, 290 Broadway, 25th Floor, New York, NY 10007–1866, (212) 637–3711.	New Jersey, New York, Puerto Rico, and Virgin Islands.
III	Harold Frankford, EPA Region 3, 1650 Arch Street, Philadelphia, PA 19103–2029, (215) 814–2108.	District of Columbia, Delaware, Maryland, Pennsylvania, Virginia, and West Virginia.
IV	Joel Huey, EPA Region 4, Atlanta Federal Center, 61 Forsyth Street SW., Atlanta, GA 30303–8960, (404) 562–9104.	Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee.
V	Christos Panos, Air and Radiation Division (AR–18J), EPA Region 5, 77 West Jackson Boulevard, Chicago, IL 60604–3507, (312) 353–8328.	Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin.
VI	Alan Shar (6PD–L), EPA Region 6, Fountain Place 12th Floor, Suite 1200, 1445 Ross Avenue, Dallas, TX 75202–2733, (214) 665–6691.	Arkansas, Louisiana, New Mexico, Oklahoma, and Texas.
VII	Lachala Kemp, EPA Region 7, Air Planning and Development Branch, 11201 Renner Boulevard, Lenexa, KS 66219, (913) 551–7214. Alternate contact is Ward Burns, (913) 551–7960.	Iowa, Kansas, Missouri, and Nebraska.
VIII	Adam Clark, Air Quality Planning Unit (8P–AR) Air Program, Office of Partnership and Regulatory Assistance, EPA Region 8, 1595 Wynkoop Street, Denver, CO 80202–1129, (303) 312–7104.	Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming.
IX	Lisa Tharp, EPA Region 9, Air Division, 75 Hawthorne Street (AIR–8), San Francisco, CA 94105, (415) 947–4142.	Arizona; California; Hawaii and the Pacific Islands; Indian Country within Region 9 and Nevada.
X	Donna Deneen, Environmental Engineer, Office of Air, Waste and Toxics (AWT–107), EPA Region 10, 1200 Sixth Avenue, Suite 900, Seattle, WA 98101, (206) 553–6706.	Alaska, Idaho, Oregon, and Washington.

I. General Information

A. Does this action apply to me?

Entities potentially affected by this rule include states, U.S. territories, local authorities, and eligible tribes that are currently administering, or may in the future administer, the EPA-approved implementation plans ("air agencies").[1] The EPA's action on the Petition is potentially of interest to all such entities because the EPA is evaluating issues related to basic CAA requirements for SIPs. Through this rulemaking, the EPA is both clarifying and applying its interpretation of the CAA with respect to SIP provisions applicable to excess emissions during SSM events. In addition, the EPA may find specific SIP

[1] The EPA respects the unique relationship between the U.S. government and tribal authorities and acknowledges that tribal concerns are not interchangeable with state concerns. Under the CAA and EPA regulations, a tribe may, but is not required to, apply for eligibility to have a tribal implementation plan (TIP). For convenience, we refer to "air agencies" in this rulemaking collectively when meaning to refer in general to states, the District of Columbia, U.S. territories, local air permitting authorities, and eligible tribes that are currently administering, or may in the future administer, EPA-approved implementation plans. The EPA notes that the petition under evaluation does not identify any specific provisions related to tribal implementation plans. We therefore refer to "state" or "states" rather than "air agency" or "air agencies" when meaning to refer to one, some, or all of the 39 states identified in the Petition. We also use "state" or "states" rather than "air agency" or "air agencies" when quoting or paraphrasing the CAA or other document that uses that term even when the original referenced passage may have applicability to tribes as well.

provisions in states identified in the Petition to be substantially inadequate to meet CAA requirements, pursuant to CAA section 110(k)(5), and thus those states will potentially be affected by this rulemaking directly. For example, if a state's existing SIP provision allows an automatic exemption for excess emissions during periods of startup, shutdown, or malfunction, such that these excess emissions do not constitute a violation of the otherwise applicable emission limitations of the SIP, then the EPA may determine that the SIP provision is substantially inadequate because the provision is inconsistent with fundamental requirements of the CAA. This rule may also be of interest to the public and to owners and operators of industrial facilities that are subject to emission limits in SIPs, because it may require changes to state rules covering excess emissions. When finalized, this action will embody the EPA's updated SSM Policy for SIP provisions relevant to excess emissions during SSM events.

B. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this proposal notice will also be available on the World Wide Web. Following signature by the EPA Assistant Administrator, a copy of this notice will be posted on the EPA's Web site, under SSM SIP Call 2013, at *www.epa.gov/air/urbanair/sipstatus.* In addition to this notice, other relevant documents are located in the docket, including a copy of the Petition and copies of each of the four guidance documents pertaining to excess emissions issued by the EPA in 1982, 1983, 1999, and 2001, which are discussed in more detail later in this proposal notice.

C. What should I consider as I prepare my comments?

1. *Submitting CBI.* Do not submit this information to the EPA through *www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in CD that you mail to the EPA, mark the outside of the CD as CBI and then identify electronically within the CD the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. Send or deliver information identified as CBI only to the following address: Roberto Morales, OAQPS Document Control Officer (C404–02), U.S. EPA, Research Triangle Park, NC 27711, Attention Docket ID No. EPA–HQ–OAR–2012–0322.

2. *Tips for preparing your comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date, and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

D. How is the preamble organized?

The information presented in this preamble is organized as follows:

E. What is the meaning of key terms used in this notice?

For the purpose of this notice, the following definitions apply unless the context indicates otherwise:

The terms *Act* or *CAA* mean or refer to the Clean Air Act.

The term *affirmative defense* means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding. By demonstrating that the elements of an affirmative defense have been met, a source may avoid a civil penalty but cannot avoid injunctive relief.

The terms *air agency* and *air agencies* mean or refer to states, the District of Columbia, U.S. territories, local air permitting authorities with delegated authority from the state, and tribal authorities.

The term *automatic exemption* means a generally applicable provision in a SIP that would provide that if certain conditions existed during a period of excess emissions, then those exceedances would not be considered violations of the applicable emission limitations.

The term *director's discretion provision* means, in general, a regulatory provision that authorizes a state regulatory official unilaterally to grant exemptions or variances from applicable emission limitations or control measures, or to excuse noncompliance with applicable emission limitations or control measures, in spite of SIP provisions that would otherwise render such conduct by the source a violation.

The term *EPA* refers to the United States Environmental Protection Agency.

The term *excess emissions* means the emissions of air pollutants from a source that exceed any applicable SIP emission limitations.

The term *malfunction* means a sudden and unavoidable breakdown of process or control equipment.

The term *NAAQS* means national ambient air quality standard or standards. These are the national primary and secondary ambient air quality standards that the EPA establishes under CAA section 109 for criteria pollutants for purposes of protecting public health and welfare.

The term *Petition* refers to the petition for rulemaking titled, "Petition to Find Inadequate and Correct Several State Implementation Plans under Section 110 of the Clean Air Act Due to Startup, Shutdown, Malfunction, and/or Maintenance Provisions," filed by the Sierra Club with the EPA Administrator on June 30, 2011.

The term *Petitioner* refers to the Sierra Club.

The term *shutdown* means, generally, the cessation of operation of a source for any reason.

The term *SIP* means or refers to a State Implementation Plan. Generally, the State Implementation Plan is the collection of state statutes and regulations approved by the EPA pursuant to CAA section 110 that together provide for implementation, maintenance, and enforcement of a national ambient air quality standard (or any revision thereof) under section 109 for any air pollutant in each air quality control region (or portion thereof) within a state. In some parts of this notice, statements about SIPs in general also apply to tribal implementation plans in general even though not explicitly noted.

The term *SSM* refers to startup, shutdown, or malfunction at a source. It does not include periods of maintenance at such a source. An SSM event is a period of startup, shutdown, or malfunction during which there are exceedances of the applicable emission limitations and thus excess emissions.

The term *SSM Policy* refers to the cumulative guidance that EPA has issued concerning its interpretation of CAA requirements with respect to treatment of excess emissions during periods of startup, shutdown, and malfunction at a source. The most comprehensive statement of the EPA's SSM Policy prior to this proposed rulemaking is embodied in a 1999 guidance document discussed in more detail in this proposal. When finalized, this action will embody the EPA's updated SSM Policy for SIP provisions relevant to excess emissions during SSM events.

The term *startup* means, generally, the setting in operation of a source for any reason.

II. Overview of Proposed Rule

A. How is the EPA proposing to respond to the Petition?

The EPA is proposing to take action on a petition for rulemaking that the Sierra Club (the Petitioner) filed with the EPA Administrator on June 30, 2011 (the Petition). The Petition concerns how air agency rules in EPA-approved SIPs treat excess emissions during periods of startup, shutdown, or malfunction of industrial process or emission control equipment. Many of these rules were added to SIPs and

approved by the EPA in the years shortly after the 1970 amendments to the CAA, which for the first time provided for the system of clean air plans that were to be prepared by air agencies and approved by the EPA. At that time, it was widely believed that emission limitations set at levels representing good control of emissions during periods of normal operation could in some cases not be met with the same emission control strategies during periods of startup, shutdown, maintenance, or malfunction. Accordingly, it was common for state plans to include provisions for special, more lenient treatment of excess emissions during such periods. Many of these provisions took the form of absolute or conditional statements that excess emissions from a source, when they occur outside of the source's normal operations, were not to be considered violations of the air agency rules, *i.e.*, exemptions.

Excess emission provisions for startup, shutdown, maintenance, and malfunctions were often included as part of the original SIPs that the EPA approved in 1971 and 1972. In the early 1970s, because the EPA was inundated with proposed SIPs and had limited experience in processing them, not enough attention was given to the adequacy, enforceability, and consistency of these provisions. Consequently, many SIPs were approved with broad and loosely-defined provisions to control excess emissions. Starting in 1977, however, the EPA discerned and articulated to air agencies that exemptions for excess emissions during such periods were inconsistent with certain requirements of the CAA. The EPA also realized that such provisions allow opportunities for sources to repeatedly emit pollutants during such periods in quantities that could cause unacceptable air pollution in nearby communities with no legal pathway for air agencies, the EPA, or the courts to require the sources to make reasonable efforts to reduce these emissions. The EPA has been more careful after 1977 not to give new approval to SIP rules that are inconsistent with the CAA and has issued several guidance memoranda to advise states on how to avoid impermissible provisions [2] as they expand and revise their SIPs. The EPA has also found several SIPs to be deficient because of problematic SSM provisions and called upon the affected states to amend their SIPs. However, in light of the other priority work facing both air agencies and the EPA, the EPA has not to date initiated a broad effort to get all states to remove impermissible provisions from their SIPs and to adopt other, approvable approaches for addressing excess emissions when appropriate. Public interest groups, including the Petitioner, have sued the EPA in several state-specific cases concerning SIP issues, and they have been urging the EPA to give greater priority to addressing the issue of SSM provisions in SIPs. In one of these SIP cases, the EPA entered into a settlement agreement requiring it to respond to the Petition from the Sierra Club. A copy of the settlement agreement is provided in the docket for this rulemaking.[3]

As alluded to earlier in this notice, there are available CAA-consistent approaches that can be incorporated into SIPs to address excess emissions during SSM events. While automatic exemptions and director's discretion exemptions from otherwise applicable emission limitations are not consistent with the CAA, SIPs may include criteria and procedures for the use of enforcement discretion by air agency personnel and appropriately defined affirmative defenses. In this action, the EPA is articulating a policy that reflects this principle and is reviewing the SIPs from 39 states to determine whether specific provisions identified in the Petition are consistent with the EPA's SSM Policy and the CAA. In some cases, this review involves a close reading of the provision in the SIP and its context to discern whether it is in fact an exemption, a statement regarding enforcement discretion by the air agency, or an affirmative defense. Each state will ultimately decide how to address any SIP inadequacies identified by the EPA once the EPA takes final action. Recognizing that for some states, the EPA's response to this Petition entails reviewing SIP provisions that may date back several decades, the EPA will work closely with each of the affected states to develop approvable SIPs consistent with the guidance articulated in the final action. Section IX of this notice presents the EPA's analysis of each SIP provision at issue. The EPA's review also hinges on interpretation of several relevant sections of the CAA. While the EPA has already developed and has been implementing the SSM Policy that is based on its interpretation of the CAA, this action provides the EPA an opportunity to invite public comment on this SSM Policy and its basis in the CAA. To that end, this notice contains a detailed clarifying explanation of the SSM Policy (including proposed revisions to it). Also, supplementary to this notice, the EPA is providing a memorandum to summarize the legal and administrative context for the proposed action, and the EPA invites public comment on the memorandum, which is available in the docket for this rulemaking.[4] This notice, and the final notice for this action after considering public comment, will also clarify for the affected states how they can resolve the identified deficiencies in their SIPs, as well as provide all air agencies guidance and model language as they further develop their SIPs in the future.

In summary, the EPA proposes to agree with the Petitioner that many of the identified SIP provisions are not permissible under the CAA. However, in several cases we are proposing to find that an identified SIP provision is actually one of the permissible approaches. Of the 39 states covered by the Petition, the EPA is proposing to make SIP calls for 36 states.

The EPA is aware of other SSM-related SIP provisions that were not identified in the Petition but that may be inconsistent with the EPA's interpretation of the CAA. The EPA may address these other provisions later in a separate notice-and-comment action.

B. What did the Petitioner request?

The Petition includes three interrelated requests concerning the treatment in SIPs of excess emissions by sources during periods of startup, shutdown, or malfunction.

First, the Petitioner argued that SIP provisions providing an affirmative defense for monetary penalties for excess emissions in judicial proceedings are contrary to the CAA. Thus, the Petitioner advocated that the EPA should rescind its interpretation of the CAA expressed in the SSM Policy that allows appropriately drawn affirmative defense provisions in SIPs. The Petitioner made no distinction between affirmative defenses for excess emissions related to malfunction, startup, or shutdown. Further, the Petitioner requested that the EPA issue a SIP call requiring states to eliminate

[2] The term "impermissible provision" as used throughout this notice is generally intended to refer to a SIP provision identified by the Petitioner that the EPA believes to be inconsistent with requirements of the CAA. As described later in this notice (*see* section VIII A), the EPA is proposing to find a SIP "substantially inadequate" to meet CAA requirements where the EPA determines that the SIP includes an impermissible provision.

[3] *See*, Settlement Agreement executed Nov. 30, 2011, to address a lawsuit filed by Sierra Club and WildEarth Guardians in the United States District Court for the Northern District of California: *Sierra Club et al.* v. *Jackson*, No. 3:10-cv-04060–CRB (N.D. Cal.).

[4] *See*, Memorandum, "Statutory, Regulatory, and Policy Context for this Rulemaking," Feb. 4, 2013.

all such affirmative defense provisions in existing SIPs. As explained later in this proposal, the EPA is proposing to grant in part and to deny in part this request. The EPA does not agree with the Petitioner that appropriately drawn affirmative defense provisions for violations due to excess emissions that result from malfunctions are contrary to the CAA, and thus the EPA is proposing to deny the request to revise its interpretation of the CAA concerning affirmative defenses for malfunctions. However, the EPA is proposing to revise its SSM Policy with respect to affirmative defenses for violations due to excess emissions that occur during startup and shutdown, in order to distinguish between planned events that are within the source's control and unplanned events that are not. The EPA believes that SIP provisions should encourage compliance during events that are within the source's control, and thus affirmative defenses for excess emissions during planned startup and shutdown are inappropriate, unlike those for excess emissions during malfunctions.

Second, the Petitioner argued that many existing SIPs contain impermissible provisions, including automatic exemptions from applicable emission limitations during SSM events, director's discretion provisions that provide discretionary exemptions from applicable emission limitations during SSM events, enforcement discretion provisions that appear to bar enforcement by the EPA or citizens for such excess emissions, and inappropriate affirmative defense provisions that are not consistent with the recommendations in the EPA's SSM Policy. The Petitioner identified specific provisions in SIPs of 39 states that it considered inconsistent with the CAA and explained the basis for its objections to the provisions. As explained later in this proposal, the EPA agrees with the Petitioner that some of these existing SIP provisions are legally impermissible and thus proposes to find such provisions "substantially inadequate" [5] to meet CAA requirements. Among the reasons for EPA's proposed action is to eliminate provisions that interfere with enforcement in a manner prohibited by the CAA. Simultaneously, the EPA proposes to issue a SIP call to the states in question requesting corrective SIP submissions to revise their SIPs accordingly. For the remainder of the identified provisions, however, the EPA disagrees with the contentions of the Petitioner and thus proposes to deny the Petition with respect to those provisions and to take no further action. The EPA's action on this portion of the Petition will assure that these SIPs comply with the fundamental requirements of the CAA with respect to the treatment of excess emissions during periods of startup, shutdown, or malfunction. The majority of the SIP calls that EPA is proposing in this action implement the EPA's longstanding interpretation of the CAA through multiple iterations of its SSM Policy. In a few instances, however, the EPA is also proposing a SIP call to address the issue of affirmative defenses during periods of planned startup and shutdown, because the EPA is revising its prior interpretation of the CAA to distinguish between violations due to excess emissions that occur during malfunctions and violations due to excess emissions that occur during planned startup and shutdown, which are modes of normal source operation.

Third, the Petitioner argued that the EPA should not rely on interpretive letters from states to resolve any ambiguity, or perceived ambiguity, in state regulatory provisions in SIP submissions. The Petitioner reasoned that all regulatory provisions should be clear and unambiguous on their face and that any reliance on interpretive letters to alleviate facial ambiguity in SIP provisions can lead to later problems with compliance and enforcement. Extrapolating from several instances in which the basis for the original approval of a SIP provision related to excess emissions during SSM events was arguably not clear, the Petitioner contended that the EPA should never use interpretive letters to resolve such ambiguities. As explained later in this proposal, the EPA acknowledges the concern of the Petitioner that provisions in SIPs should be clear and unambiguous. However, the EPA does not agree with the Petitioner that reliance on interpretive letters in a rulemaking context is never appropriate. Thus, the EPA is proposing to deny the request that actions on SIP submissions never rely on interpretive letters. Instead, the EPA explains how proper documentation of reliance on interpretive letters in notice-and-comment rulemaking nevertheless addresses the practical concerns of the Petitioner.

The EPA solicits comment on its proposed response to the overarching issues in the Petition, and in particular on its proposed action with respect to each of the specific existing SIP provisions identified in the Petition as inconsistent with the requirements of the CAA. Through this action on the Petition, the EPA is clarifying, restating, and revising its SSM Policy. When finalized, this action will embody the EPA's updated SSM Policy for SIP provisions relevant to excess emissions during SSM events.

C. To which air agencies does this proposed rulemaking apply and why?

In general, the proposal may be of interest to all air agencies because the EPA is clarifying, restating, and revising its longstanding SSM Policy with respect to what the CAA requires concerning SIP provisions relevant to excess emissions during periods of startup, shutdown, and malfunction. For example, the EPA is denying the Petitioner's request that the EPA rescind its interpretation of the CAA to allow appropriately drawn affirmative defense provisions applicable to malfunctions, as explained in EPA guidance documents on this topic. The EPA is clarifying or revising its prior guidance with respect to several issues in order to ensure that future SIP submissions, not limited to those that affected states make in response to this action, are fully consistent with the CAA. For example, the EPA is revising its prior guidance concerning whether the CAA allows affirmative defense provisions that apply during periods of planned startup and shutdown. This proposal also addresses the use of interpretive letters for purposes of EPA action on SIPs.

In addition, the proposal is directly relevant to the states with SIP provisions identified in the Petition that the Petitioner alleges are inconsistent with CAA requirements or with the EPA's guidance concerning SIP provisions relevant to excess emissions.

The EPA is proposing either to grant or to deny the Petition with respect to the specific existing SIP provisions in each of 39 states identified by the Petitioner as allegedly inconsistent with the CAA. The 39 states (comprising 46 state and local authorities and no tribal authorities) are listed in table 1, "List of States with SIP Provisions for Which the EPA Proposes Either to Grant or to Deny the Petition, in Whole or in Part." After evaluating the Petition, the EPA is proposing to grant the petition with respect to one or more provisions in 36 states of the 39 states listed, and these are the states for which the proposed action on petition, according to table 1, is either "Grant" or "Partially grant, partially deny." Conversely, the EPA is proposing to deny the petition with respect to all provisions that the Petitioner identified in 3 of the 39 states, and these (Idaho, Nebraska, and

[5] The term "substantially inadequate" is used in the CAA and is discussed in detail in section VIII.A of this notice.

Oregon) are the states for which the proposed action on petition, according to table 1, is "Deny."

For each of the states for which the EPA proposes to grant or partially to grant the Petition, the EPA proposes to find that one or more particular provisions in the state's existing SIP identified by the Petitioner are substantially inadequate to meet the requirements of the CAA. Thus, the EPA also proposes to promulgate a SIP call to each of those states, requiring the state to correct those particular SIP provisions, in accordance with the SIP call process of CAA section 110(k)(5). The SIP calls apply only to those specific provisions, and the scope of each of the SIP calls is limited to those provisions.

For each of the states for which the EPA proposes to deny or to partially deny the Petition, the EPA proposes to find that particular provisions in the existing SIP identified by the Petitioner are consistent with the requirements of the CAA and thus not substantially inadequate to meet the requirements pursuant to CAA section 110(k)(5). Thus, the EPA proposes to take no action with respect to those states for those particular SIP provisions.

TABLE 1—LIST OF STATES WITH SIP PROVISIONS FOR WHICH THE EPA PROPOSES EITHER TO GRANT OR TO DENY THE PETITION, IN WHOLE OR IN PART

EPA region	State	Proposed action on petition
I	Maine	Grant.
	New Hampshire	Partially grant, partially deny.
	Rhode Island	Grant.
II	New Jersey	Partially grant, partially deny.
III	Delaware	Grant.
	District of Columbia	Partially grant, partially deny.
	Virginia	Grant.
	West Virginia.	Grant.
IV	Alabama	Grant.
	Florida	Grant.
	Georgia	Grant.
	Kentucky	Grant.
	Mississippi	Grant.
	North Carolina	Grant.
	South Carolina	Partially grant, partially deny.
	Tennessee	Grant.
V	Illinois	Grant.
	Indiana	Grant.
	Michigan	Grant.
	Minnesota	Grant.
	Ohio	Partially grant, partially deny.
VI	Arkansas	Grant.
	Louisiana	Grant.
	New Mexico	Grant.
	Oklahoma	Grant.
VII	Iowa	Partially grant, partially deny.
	Kansas	Grant.
	Missouri	Partially grant, partially deny.
	Nebraska	Deny.
VIII	Colorado	Partially grant, partially deny.
	Montana	Grant.
	North Dakota	Grant.
	South Dakota	Grant.
	Wyoming	Grant.
IX	Arizona	Partially grant, partially deny.
X	Alaska	Grant.
	Idaho	Deny.
	Oregon	Deny.
	Washington	Grant.

For each state for which the proposed action on the Petition is either "Grant" or "Partially grant, partially deny," the EPA proposes to find that certain specific provisions in each state's SIP are substantially inadequate to meet CAA requirements for the reason that these provisions are inconsistent with the CAA with regard to how the state treats excess emissions from sources during periods of startup, shutdown, and malfunction. The EPA believes that certain specific provisions in these SIPs fail to meet fundamental statutory requirements intended to protect the NAAQS, prevention of significant deterioration (PSD) increments, and visibility. Equally importantly, the EPA believes that the same provisions may undermine the ability of states, the EPA, and the public to enforce emission limitations in the SIP that have been relied upon to ensure attainment or maintenance of the NAAQS or to meet other CAA requirements.

For each state for which the proposed action on the Petition is either "Grant" or "Partially grant, partially deny," the EPA is also proposing in this rulemaking to call for a SIP revision as necessary to correct the identified provisions. The SIP revisions that the EPA is proposing to require will rectify a number of different types of defects in existing SIPs, including automatic exemptions from emission limitations, impermissible director's discretion provisions, enforcement discretion provisions that purport to bar enforcement by the EPA or through a citizen suit, and affirmative defense provisions that are inconsistent with

CAA requirements. A corrective SIP revision addressing automatic or impermissible discretionary exemptions will ensure that excess emissions during periods of startup, shutdown, and malfunction are treated in accordance with CAA requirements. Similarly, a corrective SIP revision addressing ambiguity in who may enforce against violations of these emission limitations will also ensure that CAA requirements to provide for enforcement are met. A SIP revision to rectify deficiencies in affirmative defense provisions will assure that such defenses are only available when sources have met the criteria that justify their being shielded from monetary penalties in an enforcement action. The particular provisions for which the EPA is requiring SIP revisions are summarized in section IX of this notice. Many of these provisions were added to the respective SIPs many years ago and have not been the subject of action by the state or the EPA since.

D. What is the EPA proposing for any state that receives a finding of substantial inadequacy and a SIP call?

If the EPA finalizes a finding of substantial inadequacy and issues a SIP call for any state, the EPA's final action will establish a deadline by which the state must make a SIP submission to rectify the deficiency. Pursuant to CAA section 110(k)(5), the EPA has authority to set a SIP submission deadline up to 18 months from the date of the final finding of substantial inadequacy. Accordingly, the EPA is proposing that if it promulgates a final finding of substantial inadequacy and a SIP call for a state, the EPA will establish a date 18 months from the date of promulgation of the final finding for the state to respond to the SIP call. If, for example, the EPA's final findings are signed and disseminated in August 2013, then the SIP submission deadline for each of the states subject to the final SIP call would fall in February 2015. Thereafter, the EPA will review the adequacy of that new SIP submission in accordance with the CAA requirements of sections 110(a), 110(k), 110(l), and 193, including the EPA's interpretation of the CAA reflected in the SSM Policy as clarified and updated through this rulemaking. The EPA believes that states should be provided the maximum time allowable under CAA section 110(k)(5) in order to have sufficient time to make appropriate SIP revisions following their own SIP development process. Such a schedule will allow for the necessary SIP development process to correct the deficiencies yet still achieve the necessary SIP improvements as expeditiously as practicable.

E. What are potential impacts on affected states and sources?

The issuance of a SIP call would require an affected state to take action to revise its SIP. That action by the state may, in turn, affect sources as described below. The states that would receive a SIP call will in general have options as to exactly how to revise their SIPs. In response to a SIP call, a state retains broad discretion concerning how to revise its SIP, so long as that revision is consistent with the requirements of the CAA. Some provisions that may be identified in a final SIP call, for example an automatic exemption provision, would have to be removed entirely and an affected source could no longer depend on the exemption to avoid all liability for excess emissions. Some other provisions, for example a problematic enforcement discretion provision or affirmative defense provision, could either be removed entirely from the SIP or retained if revised appropriately, in accordance with the EPA's interpretation of the CAA as described in the EPA's SSM Policy. The EPA notes that if a state removes a SIP provision that pertains to the state's exercise of enforcement discretion, this removal would not affect the ability of the state to apply discretion in its enforcement program. It would make the exercise of such discretion case-by-case in nature.

In addition, affected states may choose to consider reassessing particular emission limitations, for example to determine whether those limits can be revised such that well-managed emissions during planned operations such as startup and shutdown would not exceed the revised emission limitation, while still protecting air quality. Such a revision of an emission limitation may need to be submitted as a SIP revision for EPA approval if the existing limit to be changed is already included in the SIP or if the existing SIP relies on the particular existing emission limit to meet a CAA requirement. In such instances, the EPA would review the SIP revision for consistency with all applicable CAA requirements. A state that chooses to revise particular emission limitations, in addition to removing the aspect of the existing provision that is inconsistent with CAA requirements, could include those revisions in the same SIP submission that addresses the SSM provisions identified in the SIP call, or it could submit them separately.

The implications for a regulated source in a given state, in terms of whether and how it would potentially have to change its equipment or practices in order to operate with emissions that comply with the revised SIP, will depend on the nature and frequency of the source's SSM events and how the state has chosen to revise the SIP to address excess emissions during SSM events. The EPA recognizes that after all the responsive SIP revisions are in place and are being implemented by the states, some sources may need to take steps to better control emissions so as to comply with emission limits continuously, as required by the CAA, or to increase durability of components and monitoring systems to detect and manage malfunctions promptly. If a state elects to have appropriately drawn affirmative defense provisions, however, such sources may not be liable for monetary penalties for any exceedances.

The EPA Regional Offices will work with states to help them understand their options and the potential consequences for sources as the states prepare their SIP revisions in response to the SIP calls.

F. What happens if an affected state fails to meet the SIP submission deadline?

If, in the future, the EPA finds that a state that is subject to a SIP call has failed to submit a complete SIP revision as required by the final rule, or the EPA disapproves such a SIP revision, then the finding or disapproval would trigger an obligation for the EPA to impose a federal implementation plan (FIP) within 24 months after that date. In addition, if a state fails to make the required SIP revision, or if the EPA disapproves the required SIP revision, then either event can also trigger mandatory 18-month and 24-month sanctions clocks under CAA section 179. The two sanctions that apply under CAA section 179(b) are the 2-to-1 emission offset requirement for all new and modified major sources subject to the nonattainment new source review program and restrictions on highway funding. More details concerning the timing and process of the SIP call, and potential consequences of the SIP call, are provided in section VIII.B of this notice.

G. What happens in an affected state in the interim period starting when the EPA promulgates the final SIP call and ending when the EPA approves the required SIP revision?

If the EPA issues a final SIP call to a state, that action alone will not cause

any automatic change in the legal status of the existing affected provision(s) in the SIP. During the time that the state takes to develop a SIP revision in accordance with the SIP call and the time that the EPA takes to evaluate and act upon the SIP revision pursuant to CAA section 110(k), the existing affected SIP provision(s) will remain in place. The EPA notes, however, that the state regulatory revisions that the state has adopted and submitted for SIP approval will most likely be already in effect at the state level during the pendency of the EPA's evaluation of and action upon the new SIP submission.

The EPA recognizes that in the interim period, there may continue to be instances of excess emissions that adversely impact attainment and maintenance of the NAAQS, interfere with PSD increments, interfere with visibility, and cause other adverse consequences as a result of the impermissible provisions. However, given the need to resolve these longstanding SIP deficiencies in a careful and comprehensive fashion, the EPA believes that providing sufficient time for these corrections to occur will ultimately be the best course to ensure the ultimate goal of eliminating the inappropriate SIP provisions and replacing them with provisions consistent with CAA requirements.

III. Statutory, Regulatory, and Policy Background

The Petition raised issues related to excess emissions from sources during periods of startup, shutdown, or malfunction, and to the correct approach to these excess emissions in SIPs. In this context, "excess emissions" are air emissions that exceed the otherwise applicable emission limitations in a SIP, *i.e.*, emissions that would be violations of such emission limitations. The question of how to address excess emissions correctly during startup, shutdown, and malfunction events has posed a challenge since the inception of the SIP program in the 1970s. The primary objective of state and federal regulators is to ensure that sources of emissions are subject to appropriate emission controls as necessary in order to attain and maintain the NAAQS, protect PSD increments, protect visibility, and meet other statutory requirements. Generally, this is achieved through enforceable emission limitations on sources that apply, as required by the CAA, continuously.

Several key statutory provisions of the CAA are relevant to the EPA's evaluation of the Petition. These provisions relate generally to the basic legal requirements for the content of SIPs, the authority and responsibility of air agencies to develop such SIPs, and the EPA's authority and responsibility to review and approve SIP submissions in the first instance, as well as the EPA's authority to require improvements to SIPs if the EPA later determines that to be necessary for a SIP to meet CAA requirements. In addition, the Petition raised issues that pertain to enforcement of provisions in a SIP. The enforcement issues relate generally to what constitutes a violation of an emission limitation in a SIP, who may seek to enforce against a source for that violation, and whether the violator should be subject to monetary penalties as well as other forms of judicial relief for that violation.

The EPA has a longstanding interpretation of the CAA with respect to the treatment of excess emissions during periods of startup, shutdown, or malfunction in SIPs. This statutory interpretation has been expressed, reiterated, and elaborated upon in a series of guidance documents issued in 1982, 1983, 1999, and 2001. In addition, the EPA has applied this interpretation in individual rulemaking actions in which the EPA: (i) Approved SIP submissions that were consistent with the EPA's interpretation;[6] (ii) disapproved SIP submissions that were not consistent with this interpretation;[7] (iii) itself promulgated regulations in FIPs that were consistent with this interpretation;[8] or (iv) issued a SIP call requiring a state to revise an impermissible SIP provision.[9]

The EPA's SSM Policy is a policy statement and thus constitutes guidance. As guidance, the SSM Policy does not bind states, the EPA, or other parties, but it does reflect the EPA's interpretation of the statutory requirements of the CAA. The EPA's evaluation of any SIP provision, whether prospectively in the case of a new provision in a SIP submission or retrospectively in the case of a previously approved SIP submission, must be conducted through a notice-and-comment rulemaking in which the EPA will determine whether or not a given SIP provision is consistent with the requirements of the CAA and applicable regulations.[10]

The Petition raised issues related to excess emissions from sources during periods of startup, shutdown, and malfunction, and the consequences of failing to address these emissions correctly in SIPs. In broad terms, the Petitioner expressed concerns that the exemptions for excess emissions and the other types of alleged deficiencies in existing SIP provisions "undermine the emission limits in SIPs and threaten states' abilities to achieve and maintain the NAAQS, thereby threatening public health and public welfare, which includes agriculture, historic properties and natural areas."[11] The Petitioner asserted that such exemptions for SSM events are "loopholes" that can allow dramatically higher amounts of emissions and that these emissions "can swamp the amount of pollutants emitted at other times."[12] In addition, the Petitioner argued that these automatic and discretionary exemptions, as well as other SIP provisions that interfere with the enforcement structure of the CAA, undermine the objectives of the CAA.

The EPA notes that the alleged SIP deficiencies are not legal technicalities. Compliance with the applicable requirements is intended to achieve the air quality protection and improvement purposes and objectives of the CAA. The EPA believes that the results of automatic and discretionary exemptions in SIPs, and of other provisions that interfere with effective enforcement of SIPs, are real-world consequences that adversely affect public health.

As described earlier in this notice, the EPA invites public comment on a memorandum that supplements this notice and provides a more detailed discussion of the statutory, regulatory and policy background for the EPA's proposed action. The memorandum can be found in the docket for this rulemaking.[13]

IV. Proposed Action in Response To Request To Rescind the EPA Policy Interpreting the CAA To Allow Appropriate Affirmative Defense Provisions

A. Petitioner's Request

The Petitioner's first request was for the EPA to rescind its SSM Policy

[6] *See*, "Approval and Promulgation of Implementation Plans; Texas; Excess Emissions During Startup, Shutdown, Maintenance, and Malfunction Activities," 75 FR 68989 (Nov. 10, 2010).

[7] *See*, "Approval and Promulgation of State Implementation Plans; Michigan," 63 FR 8573 (Feb. 20, 1998).

[8] *See*, "Federal Implementation Plan for the Billings/Laurel, MT, Sulfur Dioxide Area," 73 FR 21418 (Apr. 21, 2008).

[9] *See*, "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision," 76 FR 21639 (Apr. 18, 2011).

[10] *See, generally, Catawba County, North Carolina et al. v. EPA*, 571 F.3d 20, 33–35 (DC Cir. 2009) (upholding the EPA's process for developing and applying its guidance to designations).

[11] Petition at 2.

[12] Petition at 12.

[13] *See*, Memorandum, "Statutory, Regulatory, and Policy Context for this Rulemaking," Feb. 4, 2013.

element interpreting the CAA to allow affirmative defense provisions in SIPs for excess emissions during SSM events.[14] Related to this request, the Petitioner also asked the EPA: (i) To find that SIPs containing an affirmative defense to monetary penalties for excess emissions during SSM events are substantially inadequate because they do not comply with the CAA; and (ii) to issue a SIP call pursuant to CAA section 110(k)(5) to require each such state to revise its SIP.[15] Alternatively, if the EPA denies these two related requests, the Petitioner requested the EPA: (i) To require states with SIPs that contain such affirmative defense provisions to revise them so that they are consistent with the EPA's 1999 SSM Guidance for excess emissions during SSM events; and (ii) to issue a SIP call pursuant to CAA section 110(k)(5) to states with provisions inconsistent with the EPA's interpretation of the CAA.[16] The EPA interprets this latter request to refer to the specific SIP provisions that the Petitioner identified in a separate section of the Petition, titled, "Analysis of Individual States' SSM Provisions," including specific existing affirmative defense provisions.

The Petitioner requested that the EPA rescind its SSM Policy element interpreting the CAA to allow SIPs to include affirmative defenses for violations due to excess emissions during any type of SSM events because the Petitioner contended there is no legal basis for the policy. Specifically, the Petitioner cited to two statutory grounds, CAA sections 113(b) and (e), related to the type of judicial relief available in an enforcement proceeding and to the factors relevant to the scope and availability of such relief, that the Petitioner claimed would bar the approval of any type of affirmative defense provision in SIPs.

In the Petitioner's view, the CAA "unambiguously grants jurisdiction to the district courts to determine penalties that should be assessed in an enforcement action involving the violation of an emissions limit."[17] The Petitioner first argued that in any judicial enforcement action in the district court, CAA section 113(b) provides that "such court shall have jurisdiction to restrain such violation, to require compliance, to assess such penalty, * * * and to award any other appropriate relief." The Petitioner reasoned that the EPA's SSM Policy is therefore fundamentally inconsistent with the CAA because it purports to remove the discretion and authority of the federal courts to assess monetary penalties for violations if a source is shielded from monetary penalties under an affirmative defense provision in the approved SIP.[18] The Petitioner concluded that the EPA's interpretation of the CAA in the SSM Policy element allowing any affirmative defenses is impermissible "because the inclusion of an affirmative defense provision in a SIP limits the courts' discretion—granted by Congress—to assess penalties for Clean Air Act violations."[19]

Second, in reliance on CAA section 113(e)(1), the Petitioner argued that in a judicial enforcement action in a district court, the statute explicitly specifies a list of factors that the court is to consider in assessing penalties.[20] That section provides that either the Administrator or the court:

> * * * shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

The Petitioner argued that the EPA's SSM Policy authorizes states to create affirmative defense provisions with criteria for monetary penalties that are inconsistent with the factors that the statute specifies and that the statute explicitly directs courts to weigh in any judicial enforcement action. In particular, the Petitioner enumerated those factors that it alleges the EPA's SSM Policy totally omits: (i) The size of the business; (ii) the economic impact of the penalty on the business; (iii) the violator's full compliance history; (iv) the economic benefit of noncompliance; and (v) the seriousness of the violation. By specifying particular factors for courts to consider, the Petitioner reasoned, Congress has already definitively spoken to the question of what factors are germane in assessing monetary penalties under the CAA for violations. The Petitioner concluded that the EPA has no authority to allow a state to include an affirmative defense provision in a SIP with different criteria to be considered in awarding monetary penalties because "[p]reventing the district courts from considering these statutory factors is not a permissible interpretation of the Clean Air Act."[21] The Petitioner drew no distinction between affirmative defenses for unplanned events such as malfunctions and planned events such as startup and shutdown.

B. The EPA's Response

The EPA has considered the concerns raised by the Petitioner regarding the legal basis under the CAA for any form of affirmative defense for violations due to excess emissions as contemplated in the EPA's SSM Policy. The EPA does not agree with the Petitioner's overarching argument that CAA section 113 prohibits any affirmative defense provisions in SIPs. However, the EPA has evaluated the broader legal basis that supports affirmative defense provisions in general and the specific affirmative defense provisions identified in the Petition in particular. Although the Petitioner did not distinguish between affirmative defense provisions for unplanned events such as malfunctions and affirmative defense provisions for planned events such as startup and shutdown, the EPA's evaluation of the legal basis for affirmative defense provisions indicates that the SSM Policy should differentiate between unplanned and planned events. Accordingly, the EPA is proposing to deny the Petition in part with respect to affirmative defenses for malfunction events and to grant the Petition in part with respect to affirmative defenses for planned startup and shutdown events. To address this issue fully, it is necessary: (i) To explain the legal and policy basis for affirmative defenses for malfunction events; (ii) to explain why that basis would not extend to startup and shutdown events; and (iii) to explain why the Petitioner's arguments with respect to CAA section 113 do not preclude affirmative defense provisions for malfunction events but support the distinction between unplanned and planned events.

The EPA proposes to deny the Petition with respect to affirmative defense provisions in SIPs applicable to sources during malfunctions. The EPA's SSM Policy has long recognized that there may be limited circumstances in which excess emissions are entirely beyond the control of the owner or operator. Thus, the EPA believes that an appropriately drawn affirmative defense provision recognizes that, despite diligent efforts by sources, such circumstances may create difficulties in meeting a legally required emission limitation continuously and that

[14] Petition at 11.
[15] *Id.*
[16] Petition at 12.
[17] Petition at 10.
[18] *Id.*
[19] *Id.*
[20] Petition at 11.
[21] Petition at 11.

emission standards may be violated under limited circumstances beyond the control of the source.

In accordance with CAA section 302(k), SIPs must contain emission limitations that "limit the quantity, rate, or concentration of emissions of air pollutants on a continuous basis." [22] While "continuous" standards are required, there is also case law indicating that technology-based standards should account for the practical realities of technology. For example, in *Essex Chemical* v. *Ruckelshaus,* the court acknowledged that in setting standards under CAA section 111, "variant provisions" such as provisions allowing for upsets during startup, shutdown and equipment malfunction "appear necessary to preserve the reasonableness of the standards as a whole and that the record does not support the 'never to be exceeded' standard currently in force." [23] Though intervening case law and amendments to the CAA call into question the relevance of this line of cases today, they support the EPA's view that a system that incorporates some level of flexibility is reasonable and consistent with the overall intent of the CAA. An appropriately drawn affirmative defense provision simply provides for a defense to monetary penalties for violations that are proven to be beyond the control of the source. The EPA notes that the affirmative defense does not excuse a source from injunctive relief, *i.e.*, from being required to take further steps to prevent future upsets or malfunctions that cause harm to the public health. The EPA believes that affirmative defense provisions can supply flexibility both to ensure that emission limitations are "continuous" as required by CAA section 302(k), because any violations remain subject to a claim for injunctive relief, and to provide limited relief in actions for penalties for malfunctions that are beyond the control of the owner where the owner has taken necessary steps to minimize the likelihood and the extent of any such violation. This approach supports the reasonableness of the SIP emission limitations as a whole. SIP emission limitations must apply and be enforceable at all times. A narrow affirmative defense for malfunction events helps to meet this requirement by ensuring that even where there is a malfunction, the emission limitations are still applicable and enforceable through injunctive relief. Several courts have agreed with this approach.[24]

Because the Petitioner questioned the legal basis for affirmative defense provisions in SIPs, the EPA wants to reiterate the basis for its recommendations concerning such provisions. Starting with the 1982 SSM Guidance, the EPA has made a series of recommendations concerning how states might address violations of SIP provisions consistent with CAA requirements in the event of malfunctions. In the 1982 SSM Guidance, the EPA recommended the exercise of enforcement discretion. Subsequently, in the 1983 SSM Guidance, the EPA expanded on this approach by recommending that a state could elect to adopt SIP provisions providing parameters for the exercise of enforcement discretion by the state's personnel. In the 1999 SSM Guidance, the EPA recognized the use of an affirmative defense as a permissible method for addressing excess emissions that were beyond the control of the owner or operator of the source and recommended parameters that should be included as part of such an affirmative defense in order to ensure that it would be available only in certain narrow circumstances.

The EPA interprets the provisions in CAA section 110(a) to allow the use of narrowly tailored affirmative defense provisions in SIP provisions. In particular, CAA section 110(a) requires each state to have a SIP that provides for the attainment, maintenance, and enforcement of the NAAQS, protects PSD increments, protects visibility, and meets the other requirements of the CAA. These statutory provisions include the explicit requirements that SIPs contain emission limitations in accordance with section 110(a)(2)(A) and that these emission limitations must apply continuously in accordance with CAA section 302(k). The CAA is silent as to whether or not states may elect to create affirmative defense provisions in SIPs. In light of the ambiguity created by this silence, the EPA has interpreted the CAA to allow affirmative defense provisions in certain narrowly prescribed circumstances. While recognizing that there is some ambiguity in the statute, the EPA also recognizes that there are some limits imposed by the overarching statutory requirements such as the obligation that SIPs provide for the attainment and maintenance of the NAAQS. Thus, the EPA believes that in order for an affirmative defense provision to be consistent with the CAA, it: (i) Has to be narrowly drawn to address only those excess emissions that are unavoidable; (ii) cannot interfere with the requirement that the emission limitations apply continuously (*i.e.*, cannot provide relief from injunctive relief); and (iii) cannot interfere with the overarching requirements of the CAA, such as attaining and maintaining the NAAQS.[25]

The EPA believes this interpretation is reasonable because it does not interfere with the overarching goals of title I of the CAA, such as attainment and maintenance of the NAAQS, and at the same time recognizes that, despite best efforts of sources, technology is fallible. The EPA disagrees with the suggestion that an affirmative defense will encourage lax behavior by sources and, in fact, believes the opposite. The potential relief from monetary penalties for violations in many cases may serve as an incentive for sources to be more diligent to prevent and to minimize excess emissions in order to be able to qualify for the affirmative defense. An underlying premise of an affirmative defense provision for malfunctions is that the excess emissions are entirely beyond the control of the owner or operator of the source. First, a malfunction is a sudden and unavoidable event that cannot be foreseen or planned for. As explained in the 1999 SSM Guidance, the EPA considers malfunctions to be "sudden, unavoidable, and unpredictable in nature." [26] In order to establish an affirmative defense for a malfunction, the recommended criteria specify that the source, among other things, must have been appropriately designed, operated, and maintained to prevent such an event, and the source must have taken all practicable steps to prevent

[22] Court decisions confirm that this requirement for continuous compliance prohibits exemptions for excess emissions during SSM events. *See, e.g., Sierra Club* v. *EPA,* 551 F.3d 1019, 1021 (D.C. Cir. 2008); *US Magnesium, LLC* v. *EPA,* 690 F.3d 1157, 1170 (10th Cir. 2012).

[23] *See,* 486 F.2d 427, 433 (D.C. Cir. 1973); *Portland Cement Association* v. *Ruckelshaus,* 486 F.2d 375 (D.C. Cir. 1973).

[24] *See, Luminant Generation Co.* v. *EPA,* 699 F.3d 427 (5th Cir. 2012) (upholding the EPA's approval of an affirmative defense applicable during malfunctions in a SIP submission as a permissible interpretation of the statute under *Chevron* step 2 analysis); *Mont. Sulphur & Chemical Co.* v. *EPA,* 666 F.3d 1174, 1191–93 (9th Cir. 2012) (upholding the EPA's creation of an affirmative defense applicable during malfunctions in a FIP); *Ariz. Public Service Co.* v. *EPA,* 562 F.3d 1116, 1130 (9th Cir. 2009) (upholding the EPA's creation of an affirmative defense applicable during malfunctions in a FIP).

[25] *See, e.g.*, "Approval and Promulgation of Implementation Plans; Texas; Excess Emissions During Startup, Shutdown, Maintenance, and Malfunction Activities, Notice of proposed rulemaking," 75 FR 26892 at 26895 (May 13, 2010). In this proposed rule, the EPA explained 12 specific considerations that justified the proposed approval of the affirmative defense for unplanned events in the state's SIP submission as consistent with the requirements of the CAA.

[26] *See,* 1999 SSM Guidance at Attachment p. 4.

and to minimize the excess emissions that result from the malfunction. Through the criteria recommended in the 1999 SSM Guidance for approvable affirmative defense provisions for malfunctions, the EPA reflected its view that approvable provisions should be narrowly drawn and should be restricted to events beyond the control of the owner or operator of the source.[27] The EPA recommends that states consider 10 specific criteria in such affirmative defense provisions.

Unlike the EPA's proposed response to the request to rescind its SSM Policy with respect to affirmative defenses for malfunctions, the EPA proposes to grant the Petition with respect to its interpretation of the CAA concerning affirmative defense for excess emissions during startup and shutdown events. Accordingly, the EPA is also proposing to issue a SIP call for SIP provisions identified in the Petition that provide an affirmative defense for excess emissions during planned events, such as startup and shutdown. The legal and factual rationale for an affirmative defense provision for malfunctions does not translate to planned events such as startup and shutdown. By definition, the owner or operator of a source can foresee and plan for startup and shutdown events. Because these events are planned and predictable, the EPA believes that air agencies should be able to establish, and sources should be able to comply with, the applicable emission limitations or other control measures during these periods of time. In addition, a source can be designed, operated, and maintained to control and to minimize emissions during such normal expected events. If sources in fact cannot meet the otherwise applicable emission limitations during planned events such as startup and shutdown, then an air agency can develop specific alternative requirements that apply during such periods, so long as they meet other applicable CAA requirements.

Providing an affirmative defense to sources for violations that they could reasonably anticipate and prevent is not consistent with the theory that supports allowing such affirmative defenses for malfunctions, *i.e.*, that where excess emissions are entirely beyond the control of the owner or operator of the source it is appropriate to provide limited relief to claims for monetary penalties. The EPA has previously made the distinction that excess emissions that occur during maintenance should not be accorded special treatment, because sources should be expected to comply with emission limitations during maintenance activities as they are planned and within the control of the source.[28] The EPA believes that same rationale applies to periods of startup and shutdown.[29]

The EPA acknowledges that its 1999 SSM Guidance explicitly recognized that states could elect to create affirmative defense provisions applicable to startup and shutdown events. However, the EPA has reevaluated the justification that could support an affirmative defense during these activities and now believes that the ability and obligation of sources to anticipate and to plan for routine events such as startup and shutdown negates the justification for relief from monetary penalties for violations during those events. Moreover, the EPA notes that the various criteria recommended for affirmative defenses for startup and shutdown to a large extent already mirrored those relevant for malfunctions, such as: (i) The event could not have been prevented through careful planning and design; (ii) the excess emissions were not part of a recurring pattern; and (iii) if the excess emissions resulted from bypassing a control measure, they were unavoidable to prevent loss of life, personal injury, or severe property damage.[30] As a practical matter, many startup and shutdown events that could have met these conditions recommended in the 1999 SSM Guidance are likely to have been associated with malfunctions, and the EPA explicitly stated that if the excess emissions "occur during routine startup or shutdown periods due to a malfunction, then those instances should be treated as malfunctions." The key distinction remains, however, that normal source operations such as startup and shutdown are planned and predictable events. For this reason, the EPA is proposing to revise its SSM Policy to reflect its interpretation of the CAA that affirmative defense provisions applicable during startup and shutdown are not appropriate.

Further support for distinguishing between malfunctions and planned events such as startup and shutdown is to be found in the Petitioner's argument that affirmative defense provisions in SIPs usurp the role of courts to decide liability and to assess penalties for violations under CAA section 113. The Petitioner views CAA sections 113(b) and 113(e) as statutory bars to any form of affirmative defense provision, regardless of the nature of the event. Rather than supporting the Petitioner's conclusion, however, the EPA believes that this argument illustrates why it is appropriate to allow affirmative defenses for malfunctions but not for planned events such as startup and shutdown.

At the outset, the EPA disagrees with the Petitioner's view that CAA section 113(b) explicitly precludes air agencies from adopting, and the EPA from approving, SIP emission limitations for sources that distinguish between conduct such that some violations should only be subject to injunctive relief rather than injunctive relief and monetary penalties. Section 110(a)(2)(A) of the CAA requires states to develop SIPs that "include enforceable emission limitations * * * as may be necessary or appropriate to meet the requirements of" the CAA. However, CAA section 302(k) defines "emission limitation" very broadly to require limits on "the quantity, rate, or concentration of emissions of air pollutants on a continuous basis." Significantly, the latter definition does not on its face preclude provisions devised by the state that may distinguish between violations based on the conduct of the source. The CAA is silent on whether or not a state may include an affirmative defense provision in its SIP. The EPA believes that the CAA thus provides states with discretion in developing plans that meet statutory and regulatory requirements, such as providing for attainment and maintenance of the NAAQS, as long as they are consistent with CAA requirements.[31]

The EPA believes that creating a narrowly tailored affirmative defense for malfunctions is within an air agency's

[27] *Id.* at 3–4.

[28] *See*, "Approval and Promulgation of Implementation Plans; Texas; Excess Emissions During Startup, Shutdown, Maintenance, and Malfunction Activities," 75 FR 68989 at 68992 (Nov. 10, 2010).

[29] *In Luminant Generation Co.* v. *EPA*, 699 F.3d 427 (5th Cir. 2012), the court upheld the EPA's disapproval of an affirmative defense provision in a SIP submission that pertained to "planned activities," which included startup, shutdown, and maintenance. The EPA disapproved this provision, in part because it provided an affirmative defense for maintenance. The court rejected challenges to the EPA's disapproval of this provision, holding that under *Chevron* step 2, the EPA's interpretation of the CAA was reasonable.

[30] *See*, 1999 SSM Guidance at Attachment 5–6.

[31] States have primary responsibility for developing SIPs in accordance with CAA section 107(a). An air agency's discretion to develop SIP provisions is not unbounded, however, and the EPA's responsibility under CAA section 110(k), section 110(l), and section 193, to review SIP submissions prospectively, and under CAA section 110(k)(5) retrospectively, is to determine whether the SIP provisions in fact meet all applicable statutory and regulatory requirements. Thus, for example, the EPA does not believe that an air agency has discretion to create an exemption for excess emissions during SSM events, because such exemption would conflict with fundamental CAA requirements for SIPs.

authority, and that approving such a provision to make it part of the SIP is within the EPA's authority. An affirmative defense provision can be a means of striking a reasonable balance between the requirements of the CAA and the realities and limits of technology. Air agencies and the EPA must ensure continuous compliance but also recognize that, despite diligent efforts by sources, there may be limited unforeseen and unavoidable circumstances that create difficulties in meeting applicable emission limitations continuously.

The EPA's SSM Policy recognizes an approach under which air agencies may, if they elect, create two tiers of liability for violations due to excess emissions during periods of malfunction: (i) A lesser level of liability for violations for which the source could only be subject to injunctive relief (where it could meet the requirements for an affirmative defense with respect to penalties); and (ii) a higher level of liability for violations for which the source could be subject to both injunctive relief and monetary penalties (where it could not meet the requirements for an affirmative defense with respect to penalties).

The EPA also disagrees with the Petitioner's argument that the inclusion of penalty factors in CAA section 113(e) is a statutory bar to all affirmative defense provisions in SIPs. The EPA believes that these statutory factors apply only for violations for which the regulations approved into the SIP contemplate monetary penalties. A court, in determining whether there is a violation of the SIP provision, and whether the source has met the conditions for an affirmative defense, cannot change the forms of relief for violations provided in the approved SIP. Approval of the regulation into the SIP by the EPA thus affects the availability of monetary penalties for the violation in the first instance. The EPA reiterates, however, that such a provision would not be consistent with the requirements of the CAA if it did not preserve the availability for injunctive relief in the event of violations. Failure to provide in a SIP provision for any form of enforcement for excess emissions during SSM events would be equivalent to the type of provision that excused excess emissions during malfunction from compliance with standards under CAA section 112 that the court rejected in *Sierra Club* v. *EPA*.[32] The EPA's longstanding position with regard to SIPs is that blanket exemptions from compliance are not consistent with the requirements such as attainment and maintenance of the NAAQS because they eliminate much of the incentive that sources would otherwise have to minimize the likelihood of violations and to minimize the extent of a violation once it occurs. Elimination of potential availability of injunctive relief for violations would be fundamentally inconsistent with the requirement that there may be enforcement to cause the installation of control measures, changes of operation, or other changes necessary at the source in order to bring the source into compliance with the applicable emission limitations to meet CAA requirements.

The EPA likewise disagrees with the Petitioner's claim that the elements for establishing an affirmative defense in a SIP provision supplant the mandatory factors that Congress provided for determining the amount of penalties to be assessed in CAA section 113(e). Under CAA section 110(a)(2), states have the responsibility to devise enforceable emission limitations for sources and to develop a program for their implementation and enforcement. The CAA does not require that air agencies treat all violations equally. In devising its SIP, an air agency has authority to determine what constitutes a violation and to distinguish between different types of violations, within the bounds allowed by the CAA and applicable regulations. As the EPA has long recognized in its SSM Policy, circumstances surrounding a given violation may justify distinguishing between those where injunctive relief is appropriate versus those where both injunctive relief and monetary penalties are appropriate. Providing an affirmative defense to monetary penalties in certain circumstances does not negate the factors that Congress provided in CAA section 113(e). In the event that a source violates its emission limitations and fails to meet the requirements of an available defense in the SIP, then it is the court that determines the level of monetary penalties appropriate using the statutory factors in CAA section 113(e).

The EPA notes that the provisions of CAA section 304 relevant to citizen enforcement provide additional support for the view that air agencies can determine that certain violations should not be subject to monetary penalties. Section 304(a) explicitly provides that the court in an enforcement proceeding has jurisdiction to enforce emission limits, to issue orders, "and to apply any appropriate civil penalties." The EPA believes that monetary penalties that might otherwise be an available response to a violation cannot be "appropriate" if an air agency has properly created an affirmative defense provision that eliminates such penalties for violations under specified circumstances in the SIP provision that is before the court. The mere fact that CAA section 113(b) includes penalties as a potential form of relief for violations in general does not mean that air agencies must construct SIP requirements that in all instances require monetary penalties.

As with CAA section 110(a) governing SIP provisions in general, neither CAA section 113(b) nor CAA 113(e) expressly addresses the availability of an affirmative defense. Thus, the EPA believes it is reasonable to interpret these specific provisions in light of the need to balance the requirement for continuous compliance with emission limitations in order to meet overarching goals of the statute such as attainment and maintenance of the NAAQS with the fact that even the most diligent source may not be able to meet emission limitations 100 percent of the time. The EPA has recognized that it is permissible for an air agency to provide narrowly drawn affirmative defense provisions in SIPs that provide relief from monetary penalties for violations that occur due to circumstances beyond the control of the source. When a source has been properly designed, operated, and maintained, and has taken action to prevent and to minimize the excess emissions, such relief may be warranted. Also, as with CAA section 110(a), the EPA does not believe that CAA section 113's silence with regard to affirmative defense provisions should be interpreted to allow broad use of such provisions during planned events that are within the control of the source. The enforcement provisions of the CAA must be read in light of the goals and purposes of the provisions with which they are meant to ensure compliance. As provided above, the EPA believes that the use of an affirmative defense is appropriate only in those narrow circumstances where it is necessary to harmonize the competing interests of the CAA regarding continuous compliance and the limits or fallibility of technology.

In summary, the EPA believes that the CAA provides air agencies in the first instance in their role as the developer of SIPs, and then the EPA in its role as approver of SIPs, some discretion in defining the substantive requirements that are necessary to attain and maintain the NAAQS, protect PSD increments, and protect visibility, or to meet other CAA requirements. Until the air agency takes action to create a SIP, or the EPA takes action to create a FIP, that imposes and defines the applicable emission

[32] 551 F.3d 1019, 1021 (D.C. Cir. 2008).

limitations, there is no standard for a source to violate and thus no conduct for which a court could assess any penalties. The EPA believes that the CAA allows air agencies (or the EPA when it is promulgating a FIP) in defining emission standards to define narrowly drawn affirmative defenses that provide limited relief from monetary penalties but not for injunctive relief in specified circumstances. The EPA emphasizes that affirmative defense provisions for malfunctions need to be appropriately and narrowly drawn, and thus the SSM Policy makes recommendations for the types of criteria that would make such a provision consistent with the requirements of the CAA.

For the foregoing reasons, the EPA is proposing to grant the Petition in part, and to deny the Petition in part, with respect to the Petitioner's request that the EPA rescind its SSM Policy interpreting the CAA to allow affirmative defense provisions in SIPs for excess emissions during SSM events. In addition, the EPA is proposing to grant the Petition in part, and to deny the Petition in part, with respect to the Petitioner's request that the EPA issue SIP calls for those affirmative defense provisions in specific SIP provisions identified in the Petition. The EPA requests comment on this proposed action. As discussed in section VII.B of this notice, the EPA is also restating its recommended criteria for approvable affirmative defenses for malfunctions in SIP provisions consistent with CAA requirements. Further, as discussed in section IX of this notice, the EPA is proposing to grant or to deny the Petition with respect to the specific SIP provisions identified by the Petitioner as inconsistent with the CAA.

V. Proposed Action in Response to Request for the EPA's Review of Specific Existing SIP Provisions for Consistency With CAA Requirements

A. Petitioner's Request

The Petitioner's second request was for the EPA to find that SIPs "containing an SSM exemption or a provision that could be interpreted to affect EPA or citizen enforcement are substantially inadequate to comply with the requirements of the Clean Air Act." [33] In addition, the Petitioner requested that if the EPA finds such defects in existing SIPs, the EPA "issue a call for each of the states with such a SIP to revise it in conformity with the requirements or otherwise remedy these defective SIPs." [34]

In support of this request, the Petitioner expressed concern that many SIPs contain provisions that are inconsistent with the requirements of the CAA. According to the Petitioner, these provisions fall into two general categories: (1) Exemptions for excess emissions by which such emissions are not treated as violations; and (2) enforcement discretion provisions that may be worded in such a way that a decision by the state not to enforce against a violation could be construed by a court to bar enforcement by the EPA under CAA section 113, or by citizens under CAA section 304.

First, the Petitioner expressed concern that many SIPs have either automatic or discretionary exemptions for excess emissions that occur during periods of startup, shutdown, or malfunction. Automatic exemptions are those that, on the face of the SIP provision, provide that any excess emissions during such events are not violations even though the source exceeds the otherwise applicable emission limitations. These provisions preclude enforcement by the state, the EPA, or citizens, because by definition these excess emissions are defined as not violations. Discretionary exemptions or, more correctly, exemptions that may arise as a result of the exercise of "director's discretion" by state officials, are exemptions from an otherwise applicable emission limitation that a state may grant on a case-by-case basis with or without any public process or approval by the EPA, but that do purport to bar enforcement by the EPA or citizens. The Petitioner argued that "[e]xemptions that may be granted by the state do not comply with the enforcement scheme of title I of the Act because they undermine enforcement by the EPA under section 113 of the Act or by citizens under section 304."

The Petitioner explained that all such exemptions are fundamentally at odds with the requirements of the CAA and with the EPA's longstanding interpretation of the CAA with respect to excess emissions in SIPs. SIPs are required to include emission limitations designed to provide for the attainment and maintenance of the NAAQS and for protection of PSD increments. The Petitioner emphasized that the CAA requires that such emission limitations be "continuous" and that they be established at levels that achieve sufficient emissions control to meet the required CAA objectives when adhered to by sources. Instead, the Petitioner contended, exemptions for excess emissions often result in real-world emissions that are far higher than the level of emissions envisioned and planned for in the SIP. Citing the EPA's own guidance and past administrative actions, the Petitioner explained that exemptions from otherwise applicable emission limitations can allow large amounts of additional emissions that are not accounted for in SIPs and that exemptions thus "create large loopholes to the Act's fundamental requirement that a SIP must provide for attainment and maintenance of the NAAQS and PSD increments."

Second, the Petitioner expressed concern that many SIPs have provisions that may have been intended to govern only the exercise of enforcement discretion by the state's own personnel but are worded in a way that could be construed to preclude enforcement by the EPA or citizens if the state elects not to enforce against the violation. The Petitioner contended that "any SIP provision that purports to vest the determination of whether or not a violation of the SIP has occurred with the state enforcement authority is inconsistent with the enforcement provisions of the Act." In support of this contention, the Petitioner quoted from the EPA's recent action to rectify such a provision in the Utah SIP:

> * * * SIP provisions that give exclusive authority to a state to determine whether an enforcement action can be pursued for an exceedance of an emission limit are inconsistent with the CAA's regulatory scheme. EPA and citizens, and any court in which they seek to file an enforcement claim, must retain the authority to independently evaluate whether a source's exceedance of an emission limit warrants enforcement action.[35]

After articulating these overarching concerns with existing SIP provisions, the Petitioner requested that the EPA evaluate specific SIP provisions identified in the separate section of the Petition titled, "Analysis of Individual States' SSM Provisions." [36] In that section, the Petitioner identified specific provisions in the SIPs of 39 states that the Petitioner believed to be inconsistent with the requirements of the CAA and explained in detail the basis for that belief. In the conclusion section of the Petition, the Petitioner

[33] Petition at 14.

[34] *Id.*

[35] *See,* "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision; Notice of proposed rulemaking," 75 FR 70888 at 70892–93 (Nov. 19, 2010) (proposed SIP call, *inter alia,* to rectify an enforcement discretion provision that in fact appeared to bar enforcement by the EPA or citizens if the state decided not to enforce).

[36] Petition at 17.

listed the SIP provisions in each state for which it seeks a specific remedy.

B. The EPA's Response

In general, the EPA agrees with key statements of the Petitioner. The EPA's longstanding interpretation of the CAA is that automatic exemptions from emission limitations in SIPs are impermissible because they are inconsistent with the fundamental requirements of the CAA. The EPA has reiterated this point in its guidance documents and in rulemaking actions numerous times. The EPA has also acknowledged that it previously approved some SIP provisions that provide such exemptions in error and encouraged states to rectify them.[37]

The EPA also has a longstanding interpretation of the CAA that does not allow "director's discretion" provisions in SIPs if they provide unbounded discretion to allow what would amount to a case-specific revision of the SIP without meeting the statutory requirements of the CAA for SIP revisions. Moreover, the CAA would not allow approval of a SIP provision that provided director's discretion to create discretionary exemptions for violations when the CAA would not allow such exemptions in the first instance.

In addition, the EPA's longstanding interpretation of the CAA is that SIPs may contain provisions concerning "enforcement discretion" by the air agency's own personnel, but such provisions cannot bar enforcement by the EPA or through a citizen suit.[38] In the event such a provision could be construed by a court to preclude EPA or citizen enforcement, that provision would be at odds with fundamental requirements of the CAA pertaining to enforcement. Although the EPA does not agree with the Petitioner concerning all affirmative defense provisions in SIPs, the EPA does agree that such provisions have to meet CAA requirements.

The EPA also agrees that automatic exemptions, discretionary exemptions via director's discretion, ambiguous enforcement discretion provisions that may be read to preclude EPA or citizen enforcement, and inappropriate affirmative defense provisions can interfere with the overarching objectives of the CAA, such as attaining and maintaining the NAAQS, protection of PSD increments, and protection of visibility. Such provisions in SIPs can interfere with effective enforcement by air agencies, the EPA, and the public to assure that sources comply with CAA requirements, contrary to the fundamental enforcement structure provided in CAA sections 113 and 304.

The EPA's agreement on these broad principles, however, does not necessarily mean that the EPA agrees with the Petitioner's views as to each of the specific SIP provisions identified as problematic in the Petition. The EPA has undertaken a comprehensive review of those specific SIP provisions to determine whether they are consistent with CAA requirements, and if they are not consistent, whether the provisions are substantially inadequate to meet CAA requirements and thus warrant action to rectify.

The EPA has carefully evaluated the concerns expressed by the Petitioner with respect to each of the identified SIP provisions and has considered the specific remedy sought by the Petitioner. In many instances, the EPA tentatively concurs with the Petitioner's analysis of the provision in question and accordingly is proposing to grant the Petition with respect to that provision and simultaneously proposing to make a finding of substantial inadequacy and to issue a SIP call to rectify the SIP inadequacy. In other instances, however, the EPA tentatively disagrees with the Petitioner's analysis of the provision and thus is proposing to deny the Petition with respect to that provision and to take no further action.

The EPA's evaluation of each of the provisions identified in the Petition is summarized in section IX of this notice. For the reasons discussed in section IX of this notice, the EPA is proposing to grant the Petition in part, and to deny the Petition in part, with respect to the specific existing SIP provisions for which the Petitioner requested a remedy. The EPA requests comment on the proposed actions on these specific SIP provisions.

VI. Proposed Action in Response To Request That the EPA Limit SIP Approval to the Text of State Regulations and Not Rely Upon Additional Interpretive Letters From the State

A. Petitioner's Request

The Petitioner's third request was that when the EPA evaluates SIP revisions submitted by a state, the EPA should require "all terms, conditions, limitations and interpretations of the various SSM provisions to be reflected in the unambiguous language of the SIPs themselves."[39] The Petitioner expressed concern that the EPA has previously approved SIP submissions with provisions that "by their plain terms" do not appear to comply with the EPA's interpretation of CAA requirements embodied in the SSM Policy and has approved those SIP submissions in reliance on separate "letters of interpretation" from the state that construe the provisions of the SIP submission itself to be consistent with the SSM Policy.[40] Because of this reliance on interpretive letters, the Petitioner argued that "such constructions are not necessarily apparent from the text of the provisions and their enforceability may be difficult and unnecessarily complex and inefficient."[41]

In support of this request, the Petitioner alleged that past SIP approvals related to Oklahoma and Tennessee illustrate the practical problems that can arise from reliance on interpretive letters. With respect to Oklahoma, the Petitioner asserted that a 1984 approval of a SIP submission from that state addressing SSM provisions required two letters of interpretation from the state in order for the EPA to determine that the actual regulatory text in the SIP submission was sufficiently consistent with CAA requirements pertaining to SSM provisions.[42] The Petitioner conceded that the **Federal Register** notices for the proposed and final actions to approve the Oklahoma SIP submission did quote from the state's letters but expressed concern that those letters were not actually "promulgated as part of the Oklahoma SIP."

With respect to Tennessee, the Petitioner pointed to a more recent action concerning the redesignation of the Knoxville area to attainment for the 1997 8-hour ozone NAAQS.[43] In this action, the EPA evaluated whether the SIP for that state met requirements necessary for redesignation from nonattainment to attainment in accordance with CAA section 107(d)(3).[44] Again, the Petitioner noted that in order to complete that redesignation action, the EPA had to request that both the state and the local air planning officials confirm officially that the existing SIP provisions do not in fact provide an exemption for excess

[37] *See, e.g.*, 1982 SSM Guidance at 1.

[38] *See, e.g.*, 1983 SSM Guidance at Attachment p. 2.

[39] Petition at 16.

[40] Petition at 14.

[41] Petition at 15.

[42] *See*, "Revision to Oklahoma Regulation 1.5—Reports Required, Excess Emissions During Startup, Shutdown and Malfunction of Equipment," 49 FR 3084 (Jan. 25, 1984). At the time of the proposed and final action, the operative EPA guidance was the 1983 SSM Guidance.

[43] Petition at 15.

[44] *See*, "Redesignation of the Knoxville 1997 8-Hour Ozone Nonattainment Area to Attainment," 76 FR 12587 (Mar. 8, 2011).

emissions during SSM events and that the provisions should not be interpreted to do so. The implication of the Petitioner's observation is that if the SIP provisions had been clear and unambiguous in the first instance, interpretive letters would not have been necessary.

By contrast, the Petitioner pointed to the more recent SIP call action for Utah in which the EPA itself noted that it was unclear why the EPA had originally approved a particular SIP provision relevant to SSM events.[45] Specifically, the Petitioner quoted the EPA's own statement that "thirty years later, it is not clear how EPA reached the conclusion that exemptions granted by Utah would not apply as a matter of federal law or whether a court would honor EPA's interpretation * * *"[46] The Petitioner argued that this situation where the EPA itself was unable to ascertain why a SIP provision was previously approved as meeting CAA requirements illustrates the concern that "the state's interpretation of its regulations may (or may not) be known by parties attempting to enforce the SIP decades after the provisions were created."[47]

From these examples, the Petitioner drew the conclusion that reliance on letters of interpretation from the state, even if reflected in the **Federal Register** notice as part of the explicit basis for the SIP approval, is insufficient. The Petitioner argued that such interpretations, if they are not plain on the face of the state regulations themselves, should be set forth in the SIP as reflected in the Code of Federal Regulations. The Petitioner advocated that all parties should be able to rely on the terms of the SIP as reflected in the Code of Federal Regulations, or alternatively on the SIP as shown on an EPA Internet Web page, rather than having to rely on other interpretive letters that may be difficult to locate. The Petitioner's preferred approach, however, was that "all terms, conditions, limitations and interpretations of the various SSM provisions be reflected in the unambiguous language of the SIPs themselves."

B. The EPA's Response

The EPA agrees with the core principle advocated by the Petitioner, *i.e.*, that the language of regulations in SIPs that pertain to SSM events should be clear and unambiguous. This is necessary as a legal matter but also as a matter of fairness to all parties, including the regulated entities, the regulators, and the public. In some cases, the lack of clarity may be so significant that amending the regulation may be warranted to eliminate the potential for confusion or misunderstanding about applicable legal requirements that could interfere with compliance or enforcement. Indeed, as noted by the Petitioner, the EPA has requested that states clarify ambiguous SIP provisions when the EPA has subsequently determined that to be necessary.[48]

However, the EPA believes that the use of interpretive letters to clarify perceived ambiguity in the provisions in a SIP submission is a permissible, and sometimes necessary, approach under the CAA. Used correctly, and with adequate documentation in the **Federal Register** and the docket for the underlying rulemaking action, reliance on interpretive letters can serve a useful purpose and still meet the enforceability concerns of the Petitioner. Regulated entities, regulators, and the public can readily ascertain the existence of interpretive letters relied upon in the EPA's approval that would be useful to resolve any perceived ambiguity. By virtue of being part of the stated basis for the EPA's approval of that provision, the interpretive letters necessarily establish the correct interpretation of any arguably ambiguous SIP provision.

In addition, reliance on interpretive letters to address concerns about perceived ambiguity can often be the most efficient and timely way to resolve concerns about the correct meaning of regulatory provisions. Both air agencies and the EPA are required to follow time- and resource-intensive administrative processes in order to develop and evaluate SIP submissions. It is reasonable for the EPA to exercise its discretion to use interpretive letters to clarify concerns about the meaning of regulatory provisions, rather than to require air agencies to reinitiate a complete administrative process merely to resolve perceived ambiguity in a provision in a SIP submission.[49] In particular, the EPA considers this an appropriate approach where reliance on such an interpretive letter allows the air agency and the EPA to put into place SIP provisions that are necessary to meet important CAA objectives and for which unnecessary delay would be counterproductive. For example, where an air agency is adopting emission limitations for purposes of attaining the NAAQS in an area, a timely letter from the air agency clarifying that an enforcement discretion provision is applicable only to air agency enforcement personnel and has no bearing on enforcement by the EPA or the public could help the area reach attainment more expeditiously than requiring the air agency to undertake a time-consuming administrative process to make a minor change in the regulatory text.

Thus, to the extent that the Petitioner intended the Petition on this issue to be a request for the EPA never to use interpretive letters as part of the basis for approval of any SIP submission, the EPA disagrees with the Petitioner and accordingly is proposing to deny the request. The EPA notes that it is already the EPA's practice to assure that any interpretive letters are correctly and adequately reflected in the **Federal Register** and are included in the rulemaking docket for a SIP approval.

There are multiple reasons why the EPA does not agree with the Petitioner with respect to the alleged inadequacy of using interpretive letters to clarify specific ambiguities SIP regulations, provided this process is done correctly. First, under section 107(a), the CAA gives air agencies both the authority and the primary responsibility to develop SIPs that meet applicable statutory and regulatory requirements. However, the CAA generally does not specify exactly how air agencies are to meet the requirements substantively, nor does the CAA specify that air agencies must use specific regulatory terminology, phraseology, or format, in provisions submitted in a SIP submission. Air agencies each have their own requirements and practices with respect to rulemaking, making flexibility toward

[45] Petition at 15–16.

[46] *See*, "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision; Notice of proposed rulemaking," 75 FR 70888 at 70890 (Nov. 19, 2010).

[47] Petition at 16. The Petitioner assumed that the original SIP action was one in which the EPA must have relied on an interpretive letter from the state as a basis for the prior SIP approval. In fact, however, the EPA recognized that the EPA statement in the prior final action approving the SIP revision in 1980 concerning federal law superseding incorrect state law embodied in the SIP was incorrect. Moreover, subsequent case law has illustrated that courts will not decide that CAA requirements automatically override existing SIP provisions, regardless of whether those SIP provisions met CAA requirements at the time of the approval or since. *See, Sierra Club, et al.* v. *Georgia Power Co.*, 443 F.3d 1346, 1354 (11th Cir. 2006).

[48] *See, e.g.*, "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision," 76 FR 21639 at 21648 (Apr. 18, 2011).

[49] CAA section 110(k) directs the EPA to act on SIP submissions and to approve those that meet statutory and regulatory requirements. Implicit in this authority is the discretion, through appropriate notice-and-comment rulemaking, to determine whether or not a given SIP provision meets such requirements, in reliance on the information that the EPA considers relevant for this purpose.

terminology on the EPA's part appropriate.

As a prime example relevant to the SSM issue, CAA section 110(a)(2)(A) requires that a state's SIP shall include "enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights) as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of" the CAA. Section 302(k) of the CAA further defines the term "emission limitation" in important respects but nevertheless leaves room for variations of approach:

> * * * a requirement established by the State or Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement related to the operation or maintenance of a source to assure continuous emissions reduction, and any design, equipment, work practice or operational standard promulgated under [the CAA].

Even this most basic requirement of SIPs, the inclusion of enforceable "emission limitations," allows air agencies discretion in how to structure or word the emission limitations, so long as the provisions meet fundamental legal requirements.[50] Thus, by the explicit terms of the statute and by design, air agencies generally have considerable discretion in how they elect to structure or word their state regulations submitted to meet CAA requirements in a SIP.

Second, under CAA section 110(k), the EPA has both the authority and the responsibility to assess whether a SIP submission meets applicable CAA and regulatory requirements. Given that air agencies have authority and discretion to structure or word SIP provisions as they think most appropriate so long as they meet CAA and regulatory requirements, the EPA's role is to evaluate whether those provisions in fact meet those legal requirements.[51] Necessarily, this process entails the exercise of judgment concerning the specific text of regulations, with regard both to content and to clarity. Because actions on SIP submissions are subject to notice-and-comment rulemaking, there is also the opportunity for other parties to identify SIP provisions that they consider problematic and to bring to the EPA's attention any concerns about ambiguity in the meaning of the SIP provisions under evaluation.

Third, careful review of regulatory provisions in a SIP submission can reveal areas of potential ambiguity. It is essential, however, that regulations are sufficiently clear that regulated entities, regulators, and the public can understand the SIP requirements. Where the EPA perceives ambiguity in draft SIP submissions, it endeavors to resolve those ambiguities through interactions with the air agency in question even in advance of the SIP submission. On occasion, however, there may still remain areas of regulatory ambiguity in a SIP submission's provisions that the EPA identifies, either independently or as a result of public comments on a proposed action, for which resolution is both appropriate and necessary as part of the rulemaking action.

In such circumstances, the ambiguity may be so significant as to require the air agency to revise the regulatory text in its SIP submission in order to resolve the concern. At other times, however, the EPA may determine that with adequate explanation from the state, the provision is sufficiently clear and complies with applicable CAA and regulatory requirements. In some instances, the air agency may supply that extra explanation in an official letter from the appropriate authority to resolve any potential ambiguity. When the EPA bases its approval of a SIP submission in reliance on the air agency's official interpretation of the provision, that reading is explicitly incorporated into the EPA's action and is memorialized as the proper intended reading of the provision.

For example, in the Knoxville redesignation action that the Petitioner noted, the EPA took careful steps to ensure that the perceived ambiguity was substantively resolved and fully reflected in the rulemaking record, *i.e.*, through inclusion of the interpretive letters in the rulemaking docket, quoting relevant passages from the letters in the **Federal Register**, and carefully evaluating the areas of potential ambiguity in response to public comments on a provision-by-provision basis.

Finally, the EPA notes that while it is possible to reflect or incorporate interpretive letters in the regulatory text of the CFR, there is no requirement to do so in all actions and there are other ways for the public to have a clear understanding of the content of the SIP. First, for each SIP, the CFR contains a list or table of actions that reflects the various components of the approved SIP, including information concerning the submission of, and the EPA's action approving, each component. With this information, interested parties can readily locate the actual **Federal Register** notice in which the EPA will have explained the basis for its approval in detail, including any interpretive letters that may have been relied upon to resolve any potential ambiguity in the SIP provisions. With this information, the interested party can also locate the docket for the underlying rulemaking and obtain a copy of the interpretive letter itself. Thus, if there is any debate about the correct reading of the SIP provision, either at the time of the EPA's approval or in the future, it will be possible to ascertain the mutual understanding of the air agency and the EPA of the correct reading of the provision in question at the time the EPA approved it into the SIP. Most importantly, regardless of whether the content of the interpretive letter is reflected in the CFR or simply described in the **Federal Register** preamble accompanying the EPA's approval of the SIP submission, this mutual understanding of the correct reading of that provision upon which the EPA relied will be the reading that governs, should that later become an issue.

The EPA notes that the existence of, or content of, an interpretive letter that is part of the basis for the EPA's approval of a SIP submission is in reality analogous to many other things related to that approval. Not everything that may be part of the basis for the SIP approval in the docket, including the proposal or final preambles, the technical support documents, responses to comments, technical analyses, modeling results, or docket memoranda, will be restated *verbatim*, incorporated into, or referenced in the CFR. These background materials remain part of the basis for the SIP approval and remain available should they be needed for any purpose. To the extent that there is any question about the correct interpretation of an ambiguous provision in the future, an interested party will be able to access the docket to verify the correct meaning of SIP provisions.

With regard to the Petitioner's concern that either actual or alleged ambiguity in a SIP provision could impede an effective enforcement action, the EPA believes that its current process for evaluating SIP submissions and resolving potential ambiguities, including the reliance on interpretive

[50] The EPA notes that notwithstanding discretion in wording in regulatory provisions, many words have specific recognized legal meaning whether by statute, regulation, case law, dictionary definition, or common usage. For example, the term "continuous" has a specific meaning that must be complied with substantively, however the state may elect to word its regulatory provisions.

[51] *See, e.g., Luminant Generation Co.* v. *EPA*, 699 F.3d 427 (5th Cir. 2012) (upholding the EPA's disapproval in part of affirmative defense provision with unclear regulatory text); *US Magnesium, LLC* v. *EPA*, 690 F.3d 1157, 1170 (10th Cir. 2012) (upholding the EPA's issuance of a SIP call to clarify a provision that could be interpreted in a way inconsistent with CAA requirements).

letters in appropriate circumstances with correct documentation in the rulemaking action, minimizes the possibility for any such ambiguity in the first instance. To the extent that there remains any perceived ambiguity, the EPA concludes that regulated entities, regulators, the public, and ultimately the courts, have recourse to the administrative record to shed light on and resolve any such ambiguity as explained above.

For the foregoing reasons, the EPA is proposing to deny the Petition on this issue concerning reliance on interpretive letters in actions on SIP submissions. The EPA requests comment on this proposed action.

VII. Clarifications, Reiterations, and Revisions to the EPA's SSM Policy

A. Applicability of Emission Limitations During Periods of Startup and Shutdown

The EPA's evaluation of the Petition indicates that there is a need to clarify the SSM Policy with respect to excess emissions that occur during periods of planned startup and shutdown or other planned events. The significant number of SIP provisions identified in the Petition that create automatic or discretionary exemptions from emission limitations during startup and shutdown suggests that there may be a misunderstanding concerning whether the CAA permits such exemptions. Although the EPA's stated position on this issue has been consistent since 1977, ambiguity in some statements in the EPA's guidance documents may have left the misimpression that such exemptions are consistent with the requirements of the CAA. Recent court decisions have indicated that such exemptions for excess emissions during periods of startup and shutdown are not in fact permissible under the CAA. Thus, in acting upon the Petition the EPA is clarifying its interpretation of the requirements of the CAA to forbid exemptions from otherwise applicable emission limitations for excess emissions during planned events such as startup and shutdown in SIP provisions.

The EPA believes that any misimpression that exemptions for excess emissions are permissible during planned events such as startup and shutdown may have begun with a statement in the 1983 SSM Guidance. In this guidance, the EPA distinguished between excess emissions during unforeseeable events like malfunctions and foreseeable events like startup and shutdown. In drawing distinctions between these broad categories of events, the EPA stated:

> Startup and shutdown of process equipment are part of the normal operation of a source and should be accounted for in the planning, design and implementation of operating procedures for the process and control equipment. Accordingly, it is reasonable to expect that careful and prudent planning and design will eliminate violations of emission limitations during such periods. However, for a few sources there may exist infrequent short periods of excess emissions during startup and shutdown which cannot be avoided. Excess emissions during these infrequent short periods *need not be treated as violations* providing the source adequately shows that the excess could not have been prevented through careful planning and design and that bypassing of control equipment was unavoidable to prevent loss of life, personal injury, or severe property damage (emphasis added).[52]

The phrase "need not be treated as violations" may have been misunderstood to be a statement that the CAA would allow SIP provisions that provide an exemption for the resulting excess emissions, thereby defining the excess emissions as not a violation of the applicable emission limitations. The EPA did not intend to suggest that SIP provisions that included an actual exemption for excess emissions during startup and shutdown events would be consistent with the CAA; the EPA made this statement in the context of whether air agencies should exercise enforcement discretion and more specifically whether air agencies could elect to have SIP provisions that embodied their own exercise of enforcement discretion in such circumstances. As with any such SIP provisions addressing parameters of the air agency's own exercise of enforcement discretion, that exercise of discretion cannot purport to bar enforcement by the EPA or through a citizen suit for excess emissions that must be treated as violations to meet CAA requirements. Thus, the use of the phrase "need not be treated as violations" was at a minimum confusing because it seemed to go to the definition of what could constitute a "violation" in a SIP provision rather than to whether the air agency might or might not elect to exercise enforcement discretion in such circumstances.

The EPA believes that additional confusion may have resulted from ambiguity in the 1999 SSM Guidance. That document contained an entire section devoted to "source category specific rules for startup and shutdown." In explaining its intentions in providing that section of the guidance, the EPA stated:

> Finally, EPA is clarifying how excess emissions that occur during periods of startup and shutdown should be addressed. In general, because excess emissions that occur during these periods are reasonably foreseeable, they *should not be excused*. However, EPA recognizes that, for some source categories, even the best available emissions control systems might not be consistently effective during startup or shutdown periods. [For certain sources in certain areas] these technological limitations *may be addressed in the underlying standards themselves through narrowly-tailored SIP revisions* that take into account the potential impacts on ambient air quality caused by the inclusion of these allowances (emphasis added).[53]

The phrase "may be addressed * * * in narrowly-tailored SIP revisions" may have been misunderstood to suggest that the CAA would allow SIP provisions that provide an actual exemption for the resulting excess emissions and thus not treat the emissions as a violation of the applicable emission limitations. The EPA did not intend to suggest that an exemption would be permissible; the EPA intended to suggest that the air agency might elect to design special emission limitations or other control measures that applied to the sources in question during startup and shutdown, as indicated by the earlier phrase that the excess emissions "should not be excused."

In addition, Section III.A of the 1999 SSM Guidance recommended very specific criteria that air agencies should consider including as part of any SIP provision that was intended to apply to sources during startup and shutdown in lieu of the otherwise applicable emission limitations.[54] In order to revise the otherwise applicable emission limitation in the SIP, the EPA recommended that in order to be approvable (*i.e.*, meet CAA requirements), the new special requirements applicable to the source during startup and shutdown should be narrowly tailored and take into account considerations such as the technological limitations of the specific source category and the control technology that is feasible during startup and shutdown. However, the 1999 SSM Guidance should have been clearer that the SIP revisions under discussion could not create an exemption for emissions during startup and shutdown, but rather specific emission limitations or control measures that would apply during those periods. Also unstated but implicit was the requirement that any such SIP

[52] *See*, 1983 SSM Guidance at Attachment p. 3.

[53] *See*, 1999 SSM Guidance at 3.

[54] *See*, 1999 SSM Guidance at Attachment 3–4.

revision that would alter the existing applicable emission limitations for a source during startup and shutdown would be subject to the same requirements as any other SIP submission, *i.e.*, compliance with CAA sections 110(a), 110(k), 110(l), 193, and any other CAA provision substantively germane to the SIP revision.

The EPA concludes that the CAA does not allow SIP provisions that include exemptions from emission limitations during planned events such as startup and shutdown. Instead, the CAA would allow special emission limitations or other control measures or control techniques that are designed to minimize excess emissions during startup and shutdown. The EPA continues to recommend the seven specific criteria enumerated in Section III.A of the Attachment to the 1999 SSM Guidance as appropriate considerations for SIP provisions that apply to startup and shutdown. These criteria are:

(1) The revision must be limited to specific, narrowly defined source categories using specific control strategies (*e.g.*, cogeneration facilities burning natural gas and using selective catalytic reduction);

(2) Use of the control strategy for this source category must be technically infeasible during startup or shutdown periods;

(3) The frequency and duration of operation in startup or shutdown mode must be minimized to the maximum extent practicable;

(4) As part of its justification of the SIP revision, the state should analyze the potential worst-case emissions that could occur during startup and shutdown;

(5) All possible steps must be taken to minimize the impact of emissions during startup and shutdown on ambient air quality;

(6) At all times, the facility must be operated in a manner consistent with good practice for minimizing emissions, and the source must have used best efforts regarding planning, design, and operating procedures to meet the otherwise applicable emission limitation; and

(7) The owner or operator's actions during startup and shutdown periods must be documented by properly signed, contemporaneous operating logs, or other relevant evidence.

The EPA's evaluation of the Petition also indicates that there is a need to reiterate the SSM Policy with respect to excess emissions that occur during other periods of normal source operation in addition to during periods of startup and shutdown. A number of SIP provisions identified in the Petition create automatic or discretionary exemptions from otherwise applicable emission limitations during periods such as "maintenance," "load change," "soot blowing," "on-line operating changes," or other similar normal modes of operation. Like startup and shutdown, the EPA considers all of these to be phases of normal operation at a source, for which the source can be designed, operated, and maintained in order to meet the applicable emission limitations and during which a source should be expected to control and minimize emissions. Accordingly, exemptions for emissions during these periods of normal source operation are not consistent with CAA requirements. Excess emissions during planned and predicted periods should be treated as violations of the applicable emission limitations.

B. Affirmative Defense Provisions During Periods of Malfunction

The EPA's evaluation of the Petition indicates that it would be helpful to reiterate the SSM Policy with respect to affirmative defense provisions that would be consistent with CAA requirements for malfunctions. Many of the specific SIP provisions identified in the Petition may have been intended to operate as affirmative defenses, but nevertheless they have significant deficiencies. In particular, many of the SIP provisions at issue stipulate that if the source meets the conditions specified, then the excess emissions would not be considered violations for any purpose, not merely with respect to monetary penalties. This is contrary to the EPA's interpretation of the CAA. In addition, many of the SIP provisions identified in the Petition that resemble affirmative defense provisions do not have sufficiently robust criteria to assure that the affirmative defense is available only for events that are entirely beyond the control of the owner or operator of the source and events where the owner or operator of the sources has made all practicable efforts to comply.

After consideration of the issues raised by the Petition and the wide variety of existing SIP provisions the Petitioner alleged are deficient, the EPA wants to reiterate the criteria that it considers appropriate for approvable affirmative defense provisions in SIPs. In addition, to provide a clear illustration of regulatory text that embodies these criteria effectively, the EPA also wishes to provide an example of the regulatory provisions that the EPA employs in its own regulations to serve this purpose effectively and consistently with CAA requirements.

The criteria that the EPA recommends for approvable affirmative defense provisions for excess emissions for malfunctions consistent with CAA requirements remain essentially the same as stated in the 1999 SSM Guidance.[55] We repeat them here. Most importantly, a valid affirmative defense for excess emissions due to a malfunction can only be effective with respect to monetary penalties, not with respect to potential injunctive relief. Second, the affirmative defense should be limited only to malfunctions that are sudden, unavoidable, and unpredictable. Third, a valid affirmative defense provision must provide that the defendant has the burden of proof to demonstrate all of the elements of the defense to qualify. This demonstration has to occur in a judicial or administrative proceeding where the merits of the affirmative defense are independently and objectively evaluated. The specific criteria that the EPA recommends for an affirmative defense provision for malfunctions to be consistent with CAA requirements are:

(1) The excess emissions were caused by a sudden, unavoidable breakdown of technology, beyond the control of the owner or operator;

(2) The excess emissions (a) did not stem from any activity or event that could have been foreseen and avoided, or planned for, and (b) could not have been avoided by better operation and maintenance practices;

(3) To the maximum extent practicable the air pollution control equipment or processes were maintained and operated in a matter consistent with good practice for minimizing emissions;

(4) Repairs were made in an expeditious fashion when the operator knew or should have known that applicable emission limitations were being exceeded. Off-shift labor and overtime must have been utilized, to the extent practicable, to ensure that such repairs were made as expeditiously as practicable;

(5) The amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions;

(6) All possible steps were taken to minimize the impact of the excess emissions on ambient air quality;

(7) All emission monitoring systems were kept in operation if at all possible;

(8) The owner or operator's actions in response to the excess emissions were documented by properly signed,

[55] *See*, 1999 SSM Guidance at Attachment 3–4.

contemporaneous operating logs, or other relevant evidence;

(9) The excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and

(10) The owner or operator properly and promptly notified the appropriate regulatory authority.

One refinement to these recommendations from the 1999 SSM Guidance that should be highlighted is the EPA's view concerning whether affirmative defenses should be provided in the SIP in the case of geographic areas and pollutants "where a single source or small group of sources has the potential to cause an exceedance of the NAAQS or PSD increments." The EPA believes that such affirmative defenses may be permissible if there is no "potential" for exceedances. Such provisions may also be permissible if the affirmative defense alternatively requires the source to make an affirmative after-the-fact showing that the excess emissions that resulted from the violations did not in fact cause an exceedance of the NAAQS or PSD increments. The EPA has previously approved such provisions as meeting CAA requirements on a case-by-case basis in specific actions on SIP submissions, and in this action proposes to continue that approach under proper facts and circumstances.

In addition to the foregoing criteria for appropriate affirmative defense provisions, the EPA also recommends that air agencies consider the following regulatory language that the EPA is currently using for affirmative defense provisions when it issues new National Emissions Standards for Hazardous Air Pollutants (NESHAP) for purposes of CAA section 112.[56] Air agencies may wish to adapt this sample regulatory text for their own affirmative defense provisions in SIPs.

§ 63.456 Affirmative defense for violation of emission standards during malfunction.

In response to an action to enforce the standards set forth in §§ 63.443(c) and (d), 63.444(b) and (c), 63.445(b) and (c), 63.446(c), (d), and (e), 63.447(b) or § 63.450(d), the owner or operator may assert an affirmative defense to a claim for civil penalties for violations of such standards that are caused by malfunction, as defined at 40 CFR 63.2. Appropriate penalties may be assessed, however, if the owner or operator fails to meet the burden of proving all of the requirements in the affirmative defense. The affirmative defense shall not be available for claims for injunctive relief.

(a) To establish the affirmative defense in any action to enforce such a standard, the owner or operator must timely meet the reporting requirements in paragraph (b) of this section, and must prove by a preponderance of evidence that:

(1) The violation:

(i) Was caused by a sudden, infrequent, and unavoidable failure of air pollution control equipment, process equipment, or a process to operate in a normal or usual manner; and

(ii) Could not have been prevented through careful planning, proper design, or better operation and maintenance practices; and

(iii) Did not stem from any activity or event that could have been foreseen and avoided, or planned for; and

(iv) Was not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and

(2) Repairs were made as expeditiously as possible when a violation occurred. Off-shift and overtime labor were used, to the extent practicable to make these repairs; and

(3) The frequency, amount and duration of the violation (including any bypass) were minimized to the maximum extent practicable; and

(4) If the violation resulted from a bypass of control equipment or a process, then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage; and

(5) All possible steps were taken to minimize the impact of the violation on ambient air quality, the environment, and human health; and

(6) All emissions monitoring and control systems were kept in operation if at all possible, consistent with safety and good air pollution control practices; and

(7) All of the actions in response to the violation were documented by properly signed, contemporaneous operating logs; and

(8) At all times, the affected source was operated in a manner consistent with good practices for minimizing emissions; and

(9) A written root cause analysis has been prepared, the purpose of which is to determine, correct, and eliminate the primary causes of the malfunction and the violation resulting from the malfunction event at issue. The analysis shall also specify, using best monitoring methods and engineering judgment, the amount of any emissions that were the result of the malfunction.

(b) *Report.* The owner or operator seeking to assert an affirmative defense shall submit a written report to the Administrator with all necessary supporting documentation, [showing] that it has met the requirements set forth in paragraph (a) of this section. This affirmative defense report shall be included in the first periodic compliance [report], deviation report, or excess emission report otherwise required after the initial occurrence of the violation of the relevant standard (which may be the end of any applicable averaging period). If such compliance [report], deviation report, or excess emission report is due less than 45 days after the initial occurrence of the violation, the affirmative defense report may be included in the second compliance [report], deviation report, or excess emission report due after the initial occurrence of the violation of the relevant standard. (Punctuation adjusted)

The EPA notes that this example regulatory text has some features that are not explicitly among the criteria recommended for SIP provisions in the SSM Policy, such as the requirement for a "root cause analysis" in subsection (a)(9) and an affirmative requirement to report the malfunction to the regulator by a set date and in a particular report, rather than merely a general duty to report the malfunction event to the regulator. The EPA considers such features useful because they serve important purposes related to the analysis, documentation, and memorialization of the facts concerning the malfunction, thereby facilitating better evaluation of the events and better evaluation of the source's qualification for the affirmative defense. The EPA believes that these specific features would be very useful and thus recommends that they be included in SIP provisions for affirmative defenses. However, these features need not be required, so long as the SIP provision otherwise provides that the owner or operator of the source will: (i) Bear the burden of proof to establish that the elements of the affirmative defense have been met; and (ii) properly and promptly notify the appropriate regulatory authority about the malfunction.

The EPA also wants to reiterate its views concerning appropriate affirmative defense provisions as they relate to malfunctions that occur during planned startup and shutdown and as they relate to startup and shutdown that occur as the result of or part of a malfunction. With respect to malfunctions that happen to occur during planned startup or shutdown, as the EPA articulated in the 1999 SSM Guidance, the excess emissions that occur as a result of the malfunction may be addressed by an appropriately drawn affirmative defense provision consistent with the recommended criteria for such provisions.[57] By definition, the malfunction would have been sudden, unavoidable, and unpredictable, and the source could not have precluded the event by better source design, operation and maintenance. The EPA interprets the CAA to allow narrowly drawn affirmative defense provision in SIPs in such circumstances.

Another question is how to treat the excess emissions that occur during a startup or shutdown that is necessitated

[56] *See,* "National Emission Standards for Hazardous Air Pollutants From the Pulp and Paper Industry," final rule, 77 FR 55698 (Sept. 11, 2012). Parameters for the affirmative defense are provided at p. 55712.

[57] *See,* 1999 SSM Guidance at attachment p. 6.

by the malfunction and are thus potentially components of the malfunction event. The EPA believes that drawing the distinction between what is directly caused by the malfunction itself and what is indirectly caused by the malfunction as a part of non-routine startup and shutdown must always be a case-specific enquiry, dependent upon the facts and circumstances of the specific event. It is foreseeable that a shutdown necessitated by a malfunction could be considered part of the malfunction event with the appropriate demonstration of the need to shut down differently than during a routine shutdown, during which a source should be expected to comply with applicable emission limitations. It is possible, however, that a routine shutdown may be achievable following a malfunction event, and a source should be expected to strive for this result. With respect to startups after a malfunction event, the EPA believes that such startups should not be considered part of the malfunction, because startups are within the control of the source. Malfunctions should have been resolved prior to startup, and the source should be designed, operated, and maintained so that it would meet emission limitations during startups. As a general matter, the EPA does not anticipate that there would be startups that would follow a malfunction that should be considered part of the malfunction event, but in this action the EPA is requesting that commenters address this issue if there could be circumstances that would justify such treatment.

Finally, the EPA reiterates that an affirmative defense provision in a SIP cannot extend to direct federal regulations such as New Source Performance Standards (NSPS) or NESHAP that the air agency may elect to adopt into its SIP, or to incorporate by reference into its SIP in order to receive delegation of federal authority. To the extent that any affirmative defense is warranted during malfunctions for these technology-based standards, the federal standards contained in the EPA's regulations already specify the appropriate affirmative defense. No additional or different affirmative defense provision applicable through a SIP provision would be warranted or appropriate.

C. Affirmative Defense Provisions During Periods of Startup and Shutdown

The EPA's evaluation of the Petition indicates that revisions to the SSM Policy are necessary with respect to affirmative defense provisions during startup and shutdown periods. In the 1999 SSM Guidance, the EPA explicitly discussed the possibility of affirmative defenses in the context of startup and shutdown, and provided recommended criteria to ensure that any such affirmative defense provisions in a SIP submission would be appropriately narrowly drawn to comply with CAA requirements. As with affirmative defense provisions for malfunctions, the EPA then believed that achieving a balance between the requirement of the statute for emission limitations that apply continuously and the possibility that not all sources can comply 100 percent of the time justified such affirmative defenses during startup and shutdown as a means of providing some flexibility while still supporting the overall objectives of the CAA.

Review of the Petition and reconsideration of this question in light of recent case law concerning emission limitations and affirmative defenses has caused the EPA to alter its view on the appropriateness of affirmative defenses applicable to planned events such as startup and shutdown. The EPA believes that sources should be designed, maintained, and operated in order to comply with applicable emission limitations during normal operations. By definition, planned events such as startup and shutdown are phases of normal source operation. Because these events are modes of normal operation, the EPA believes that sources should be expected to comply with applicable emission limitations during such events.

Unlike malfunctions, startup and shutdown are not unexpected events and are not events that are beyond the control of the owner or operator of the source. Also unlike malfunctions, it is possible for the source to anticipate the amount of emissions during startup and shutdown, to take appropriate steps to limit those emissions as needed, and to remain in continuous compliance. In the event that a source in fact cannot comply with the otherwise applicable emission limitations during normal modes of source operation due to technological limitations, then it may be appropriate for the state to provide special emission limitations or control measures that apply to the source during startup and shutdown.

The EPA acknowledges that the availability of an affirmative defense for planned startup and shutdown as contemplated in the 1999 SSM Guidance may have provided extra incentive for sources to take extra precautions to minimize emissions during startup and shutdown in order to be eligible for the affirmative defense in the event of a violation. However, sources should not need extra incentive to comply during normal modes of operation such as startup and shutdown, as they should be designed, operated, and maintained in order to comply with applicable emission limitations at all times, and certainly during planned and predictable events. By logical extension, the theory that an affirmative defense should be available during planned startup and shutdown could apply to all phases of normal source operation, which would not be appropriate.

The EPA believes that providing affirmative defenses for violations that occur as a result of planned events within the control of the owner or operator of the source is inconsistent with the requirements of CAA sections 113 and 304, which provide for potential civil penalties for violations of SIP requirements. The distinction that makes affirmative defenses appropriate for malfunctions is that by definition those events are unforeseen and could not have been avoided by the owner or operator of the source, and the owner or operator of the source will have taken steps to prevent the violation and to minimize the effects of the violation after it occurs. In such circumstances, the EPA interprets the CAA to allow narrowly drawn affirmative defense provisions that may shield owners or operators of sources from civil penalties, when their conduct justifies this relief.

Such is not the case with planned and predictable events, such as startup and shutdown, during which the owners or operators of sources should be expected to comply with applicable emission limitations and should not be accorded relief from civil penalties if they fail to do so. Providing an affirmative defense for monetary penalties for violations that result from planned events is inconsistent with the basic premise that the excess emissions were beyond the control of the owner or operator of the source and thus is diametrically opposed to the intended purpose of such an affirmative defense to encourage better compliance even by sources for which 100-percent compliance is not possible. The EPA notes that enforcement discretion may still be warranted in such circumstances, but the elimination of potential civil penalties is not appropriate. For these reasons, the EPA is proposing to rescind its prior interpretation of the CAA that would

allow affirmative defense provisions during planned startup and shutdown.[58]

D. Relationship Between SIP Provisions and Title V Regulations

The EPA's review of the Petition has highlighted an area of potential ambiguity or conflict between the SSM Policy applicable to SIP provisions and the EPA's regulations applicable to title V permit provisions. The EPA has promulgated regulations in 40 CFR part 70 applicable to state operating permit programs and in 40 CFR part 71 applicable to federal operating permit programs.[59] Under each set of regulations, the EPA has provided that permits may contain, at the permitting authority's discretion, an "emergency provision."[60] The relationship between such an "emergency provision" in a permit applicable to a source and the SIP provisions applicable to the same source with respect to excess emissions during a malfunction event warrants explanation.

The regulatory parameters applicable to such emergency provisions in operating permits are the same for both state operating permit programs regulations and the federal operating permit program regulations. The definition of emergency is identical in the regulations for each program:

> An "emergency" means any situation arising from sudden and reasonably unforeseeable events beyond the control of the source, including acts of God, which situation requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation under the permit, due to unavoidable increases in emissions attributable to the emergency. An emergency shall not include noncompliance to the extent caused by improperly designed equipment, lack of preventative maintenance, careless or improper operation or operator error.[61]

Thus, the definition of "emergency" in these title V regulations is similar to the concept of "malfunctions" in the EPA's SSM Policy for SIP provisions, but it uses somewhat different terminology concerning the nature of the event and restricts the qualifying exceedances to "technology-based" emission limitations.[62] Some SIP provisions may also be "technology-based" emission limitations and thus this terminology in the operating permit regulations may engender some potential inconsistency with the SSM Policy.

If there is an emergency event meeting the regulatory definition, then the EPA's regulations for operating permits provide that the source can assert an "affirmative defense" to enforcement for noncompliance with technology-based standards during the emergency event. In order to establish the affirmative defense, the regulations place the burden of proof on the source to demonstrate through specified forms of evidence that:

(i) An emergency occurred and that the permittee can identify the cause(s) of the emergency;

(ii) The permitted facility was at the time being properly operated;

(iii) During the period of the emergency the permittee took all reasonable steps to minimize levels of emissions that exceeded the emission standards, or other requirements in the permit; and

(iv) The permittee submitted notice of the emergency to the permitting authority within 2 working days of the time when emission limitations were exceeded due to the emergency. This notice fulfills the requirement of either paragraph 40 CFR 70.6(a)(3)(iii)(B) or 40 CFR 71.6(a)(3)(iii)(B). This notice must contain a description of the emergency, any steps taken to mitigate emissions, and corrective actions taken.[63]

The Petitioner did not directly request that the EPA evaluate the existing regulatory provisions applicable to operating permits in 40 CFR part 70 and 40 CFR part 71, and the EPA is not revising those provisions in this action. However, the Petitioner did identify a number of specific SIP provisions that indirectly relate to this issue because the state may have modeled its SIP provision, at least in part, on the EPA's operating permit regulations.[64] In those instances, the state in question presumably intended to create an affirmative defense applicable during malfunctions appropriate for SIP provisions, but by using the terminology used in the operating permit regulations, the state has created provisions that are not permissible in SIPs.

The elements for the affirmative defense in the title V permit regulations are similar to the criteria recommended in the SSM Policy for SIP provisions applicable to malfunctions. However, the elements for the affirmative defense provisions in operating permits do not explicitly include some of the criteria that the EPA believes are necessary in order to make such a provision appropriate in a SIP provision. For example, the EPA recommends that approvable SIP provisions include an affirmative duty for the source to establish that the malfunction was "not part of a recurring pattern indicative of inadequate design, operation, or maintenance."[65] In addition, the regulations applicable to operating permits use somewhat different terminology for the elements of the defense, such as providing that the emergencies were "sudden and reasonably unforeseeable events beyond the control of the source," whereas the EPA's SSM Policy describes malfunctions as events that "did not stem from any activity or event that could have been foreseen and avoided, or planned for."[66] Again, the use of somewhat different terminology about the elements the source must establish in order to qualify for an affirmative defense may engender some potential inconsistency with the EPA's SSM Policy.

Although the differing regulatory terminology with respect to the nature of the event or the elements necessary to establish an affirmative defense may not ultimately be significant in practical application in a given enforcement action, there are two additional ways in which incorporation of the text of the regulatory provisions in 40 CFR 70.6(g) and 40 CFR 71.6(g) into a SIP is potentially more directly in conflict with the SSM Policy. First, these provisions do not explicitly limit the affirmative defense only to civil penalties available under the CAA for violations of emission limitations. Each provision states only that an

[58] In accordance with CAA section 113(e), sources retain the ability to seek lower monetary penalties through the factors provided for consideration in administrative or judicial enforcement proceedings. In this context, for example, a violating source could argue that factors such as good faith efforts to comply should reduce otherwise applicable statutory penalties.

[59] *See*, 40 CFR sections 70.1–70.12; 40 CFR sections 71.1–71.27.

[60] *See*, 40 CFR 70.6(g); 40 CFR 71.6(g). The EPA also notes that states are not required to adopt the "emergency provision" contained in 40 CFR 70.6(g) into their state operating permit programs, and many states have chosen not to do so. *See, e.g.*, "Clean Air Act Full Approval of Partial Operating Permit Program; Allegheny County; Pennsylvania; Direct final rule," 66 FR 55112 at 55113 (Nov. 1, 2001).

[61] *See*, 40 CFR 70.6(g)(1); 40 CFR 71.6(g)(1).

[62] 1999 SSM Guidance at Attachment p. 1 and footnote 6. The term "malfunction" means "a sudden and unavoidable breakdown of process or control equipment." The malfunction events that may be suitable for an affirmative defense are those that are "caused by circumstances entirely beyond the control of the owner or operator." The EPA notes that by definition emergencies do not include normal source operation such as startup, shutdown, or maintenance.

[63] 40 CFR 70.6(g)(3); 40 CFR 71.6(g)(3).

[64] *See, e.g.*, Petition at 24. The Petitioner identified a provision in the Arkansas SIP that appears to be closely modeled on 40 CFR 70.6(g).

[65] 1999 SSM Guidance at Attachment pp. 3–4.

[66] 1999 SSM Guidance at Attachment p. 3.

"emergency constitutes an affirmative defense to an action brought for noncompliance" if the source proves that it meets the conditions for the affirmative defense.[67] Given this lack of an explicit limitation, it could be argued that SIP provisions that copy the wording of 40 CFR 70.6(g) and 40 CFR 71.6(g) are not limited to civil penalties.[68] Such a reading would be inconsistent with the EPA's view that affirmative defenses in SIP provisions are only consistent with the CAA if they apply to civil penalties and not to injunctive relief. The EPA believes it is essential for SIPs to ensure that injunctive relief is available should a court determine that such relief is necessary to prevent excess emissions in the future.

Second, these operating permit regulatory provisions state that they are "in addition to any emergency or upset provision contained in any applicable requirement."[69] The EPA's view is that federal technology-based standards already include the appropriate affirmative defense provisions, if any, and that creation of additional affirmative defenses via a SIP provision is impermissible.[70] Thus, SIP provisions that add to or alter the terms of any federal technology-based standards would be substantially inadequate to meet CAA requirements.[71]

In this action, the EPA is taking action to evaluate the specific SIP provisions identified in the Petition and is proposing to make a finding of substantial inadequacy and to issue a SIP call for those SIP provisions that include features that are inappropriate for SIPs, regardless of whether those provisions contain terms found in other regulations. First, consistent with its longstanding interpretation of the CAA with respect to SIP requirements, the EPA believes that approvable affirmative defenses in a SIP provision can only apply to civil penalties, not to injunctive relief. Second, approvable affirmative defenses in a SIP provision should reflect the recommended criteria in the EPA's SSM Policy to assure that sources only assert affirmative defenses in appropriately narrow circumstances. Third, approvable affirmative defenses in a SIP provision cannot operate to create different or additional defenses from those that are provided in underlying federal technology-based emission limitations, such as NSPS or NESHAP. SIPs are comprised of emission limitations that are intended to provide for attainment and maintenance of the NAAQS, protection of PSD increments, protection of visibility, and other CAA objectives. Thus, the EPA believes that only narrowly drawn affirmative defense provisions, as recommended in its SSM Policy, are consistent with these overarching SIP requirements of the CAA.

E. Intended Effect of the EPA's Action on the Petition

As in the 2001 SSM Guidance, the EPA is endeavoring to be particularly clear about the intended effect of its proposed action on the Petition, of its proposed clarifications and revisions to the SSM Policy, and ultimately of its final action on the Petition.

First, the EPA only intends its actions on the larger policy or legal issues raised by the Petitioner to inform the public of the EPA's current views on the requirements of the CAA with respect to SIP provisions related to SSM events. Thus, for example, the EPA's proposed disapproval of the Petitioner's request that the EPA disallow all affirmative defense provisions for excess emissions during malfunctions is intended to convey that the EPA has not changed its views that such provisions can be consistent with CAA requirements for SIPs with respect to malfunctions. In this fashion, the EPA's action on the Petition provides updated guidance relevant to future SIP actions.

Second, the EPA only intends its actions on the specific existing SIP provisions identified in the Petition to be applicable to those provisions. The EPA does not intend its action on those specific provisions to alter the current status of any other existing SIP provisions relating to SSM events. The EPA must take later rulemaking actions, if necessary, in order to evaluate any comparable deficiencies in other existing SIP provisions that may be inconsistent with the requirements of the CAA. Again, however, the EPA's actions on the Petition provide updated guidance on the types of SIP provisions that it believes would be consistent with CAA requirements in future rulemaking actions.

Third, the EPA does not intend its action on the Petition to affect existing permit terms or conditions regarding excess emissions during SSM events that reflect previously approved SIP provisions. In the event that the EPA finalizes a proposed finding of substantial inadequacy and a SIP call for a given state, the state will have time to revise its SIP in response to the SIP call through the necessary state and federal administrative process. Thereafter, any needed revisions to existing permits will be accomplished in the ordinary course as the state issues new permits or reviews and revises existing permits. The EPA does not intend the issuance of a SIP call to have automatic impacts on the terms of any existing permit.

Fourth, the EPA does not intend its action on the Petition to alter the emergency defense provisions at 40 CFR 70.6(g) and 40 CFR 71.6(g), *i.e.*, the title V regulations pertaining to "emergency provisions" permissible in title V operating permits. The EPA's regulations applicable to title V operating permits may only be changed through appropriate rulemaking procedures and existing permit terms may only be changed through established permitting processes.

Fifth, the EPA does not intend its interpretations of the requirements of the CAA in this action on the Petition to be legally dispositive with respect to any particular current enforcement proceedings in which a violation of SIP emission limitations is alleged to have occurred. The EPA handles enforcement matters by assessing each situation, on a case-by-case basis, to determine the appropriate response and resolution. For purposes of alleged violations of SIP provisions, however, the terms of the applicable SIP provision will continue to govern until that provision is revised following the appropriate process for SIP revisions, as required by the CAA.

Finally, the EPA does intend that the final notice for this action after considering public comments will embody its most current SSM Policy, reflecting the EPA's interpretation of CAA requirements applicable to SIP provisions related to excess emissions during SSM events. In this regard, the EPA is proposing to add to and clarify its prior statements in the 1999 SSM Guidance and to make the specific

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[67] 40 CFR 70.6(g)(2); 40 CFR 71.6(g)(2).

[68] Because title V requires that a source have a permit that "assure[s] compliance with applicable [CAA] requirements," CAA section 504(a), it follows that the title V emergency provision itself can best be read to provide only an affirmative defense against civil penalties and not against injunctive relief. *See also,* "National Emission Standards for Hazardous Air Pollutant Emissions for Primary Lead Processing; Final Rule," 76 FR 70834 at 70838/2 (Nov. 15, 2011) (explaining why limiting affirmative defenses to civil penalties conforms with the purposes of the CAA and existing case law).

[69] 40 CFR 70.6(g)(5); 40 CFR 71.6(g)(5).

[70] 1999 SSM Guidance at Attachment p. 3, footnote 6. The EPA explained that to the extent a state elected to include federal technology-based standards into its SIP, such as NSPS or NESHAPs, the standards should not deviate from those standards as promulgated. Because the EPA has already taken into account technological limitations in setting the standards, additional exemptions or affirmative defenses would be inappropriate.

[71] *See,* "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision," 74 FR 21639 (Apr. 18, 2011) (the EPA issued a SIP call because, *inter alia,* the SIP provision applied to NSPS and NESHAP); *US Magnesium, LLC* v. *EPA,* 690 F.3d 1157 (10th Cir. 2012) (upholding the SIP call).

changes to that guidance as discussed in this action. Thus, the final notice for this action will constitute the EPA's SSM Policy on a going-forward basis.

VIII. Legal Authority, Process, and Timing for SIP Calls

A. SIP Call Authority Under Section 110(k)(5)

1. General Statutory Authority

The CAA provides a mechanism for the correction of flawed SIPs, under CAA section 110(k)(5), which provides:

> (5) Calls for plan revisions
> Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standards, to mitigate adequately the interstate pollutant transport described in section [176A] of this title or section [184] of this title, or to otherwise comply with any requirement of [the Act], the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions.

By its explicit terms, this provision authorizes the EPA to find that a state's existing SIP is "substantially inadequate" to meet CAA requirements and, based on that finding, to "require the State to revise the [SIP] as necessary to correct such inadequacies." This type of action is commonly referred to as a "SIP call." [72]

Significantly, CAA section 110(k)(5) explicitly authorizes the EPA to issue a SIP call "whenever" the EPA makes a finding that the existing SIP is substantially inadequate, thus providing authority for the EPA to take action to correct existing inadequate SIP provisions even long after their initial approval, or even if the provisions only become inadequate due to subsequent events.[73] The statutory provision is worded in the present tense, giving the EPA authority to rectify any deficiency in a SIP that currently exists, regardless of the fact that the EPA previously approved that particular provision in the SIP and regardless of when that approval occurred.

It is also important to emphasize that CAA section 110(k)(5) expressly directs the EPA to take action if the SIP provision is substantially inadequate not just for purposes of attainment or maintenance of the NAAQS, but also for purposes of "any requirement" of the CAA. The EPA interprets this reference to "any requirement" of the CAA on its face to authorize reevaluation of an existing SIP provision for compliance with those statutory and regulatory requirements that are germane to the SIP provision at issue. Thus, for example, a SIP provision that is intended to be an "emission limitation" for purposes of a nonattainment plan for purposes of the 1997 $PM_{2.5}$ NAAQS must meet various applicable statutory and regulatory requirements, including requirements of CAA section 110(a)(2)(A) such as enforceability, the definition of the term "emission limitation" in CAA section 302(k), the level of emissions control required to constitute a "reasonably available control measure" in CAA section 172(c)(1), and the other applicable requirements of the implementation regulations for the 1997 $PM_{2.5}$ NAAQS. Failure to meet any of those applicable requirements could constitute a substantial inadequacy suitable for a SIP call, depending upon the facts and circumstances. By contrast, that same SIP provision should not be expected to meet specifications of the CAA that are completely irrelevant for its intended purpose, such as the unrelated requirement of CAA section 110(a)(2)(G) that the state have general legal authority comparable to CAA section 303 for emergencies.

Use of the term "any requirement" in CAA section 110(k)(5) also reflects the fact that SIP provisions could be substantially inadequate for widely differing reasons. One provision might be substantially inadequate because it fails to prohibit emissions that contribute to violations of the NAAQS in downwind areas many states away. Another provision, or even the same provision, could be substantially inadequate because it also infringes on the legal right of members of the public who live adjacent to the source to enforce the SIP. Thus, the EPA has previously interpreted CAA section 110(k)(5) to authorize a SIP call to rectify SIP inadequacies of various kinds, both broad and narrow in terms of the scope of the SIP revisions required.[74] On its face, CAA section 110(k)(5) authorizes the EPA to take action with respect to SIP provisions that are substantially inadequate to meet any CAA requirements, including requirements relevant to the proper treatment of excess emissions during SSM events.

An important baseline question is whether a given deficiency renders the SIP provision "substantially inadequate." The EPA notes that the term "substantially inadequate" is not defined in the CAA. Moreover, CAA section 110(k)(5) does not specify a particular form of analysis or methodology that the EPA must use to evaluate SIP provisions for substantial inadequacy. Thus, under *Chevron* step 2, the EPA is authorized to interpret this provision reasonably, consistent with the provisions of the CAA. In addition, the EPA is authorized to exercise its discretion in applying this provision to determine whether a given SIP provision is substantially inadequate. To the extent that the term "substantially inadequate" is ambiguous, the EPA believes that it is reasonable to interpret the term in light of the specific purposes for which the SIP provision at issue is required, and thus whether the provision meets the fundamental CAA requirements applicable to such a provision.

The EPA does not interpret CAA section 110(k)(5) to require a showing that the effect of a SIP provision that is facially inconsistent with CAA

[72] The EPA also has other discretionary authority to address incorrect SIP provisions, such as the authority in CAA section 110(k)(6) for the EPA to correct errors in prior SIP approvals. The authority in CAA section 110(k)(5) and CAA section 110(k)(6) can sometimes overlap and offer alternative mechanisms to address problematic SIP provisions. In this instance, the EPA believes that the mechanism provided by CAA section 110(k)(5) is the better approach, because using the mechanism of the CAA section 110(k)(6) error correction would eliminate the affected emission limitations from the SIP potentially leaving no emission limitation in place, whereas the mechanism of the CAA section 110(k)(5) SIP call will keep the provisions in place during the pendency of the state's revision of the SIP and the EPA's action on that revision. In the case of provisions that include impermissible automatic exemptions or discretionary exemptions, the EPA believes that retention of the existing SIP provision is preferable to the absence of the provision in the interim.

[73] *See, e.g., Michigan* v. *EPA*, 213 F.3d 663 (D.C. Cir. 2000) (upholding the "NO_X SIP Call" to states requiring revisions to previously approved SIPs with respect to ozone transport and section 110(a)(20)(D)(i)(I)); "Action to Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call; Final Rule," 75 FR 77698 (Dec. 13, 2010) (the EPA issued a SIP call to 13 states because the endangerment finding for GHGs meant that these previously approved SIPs were substantially inadequate because they did not provide for the regulation of GHGs in the PSD permitting programs of these states as required by CAA section 110(a)(2)(C) and section 110(a)(2)(J)); "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision," 74 FR 21639 (Apr. 18, 2011) (the EPA issued a SIP call to rectify SIP provisions dating back to 1980).

[74] *See, e.g.*, "Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone," 63 FR 57356 (Oct. 27, 1998) (the EPA issued a SIP call to 23 states requiring them to rectify the failure to address interstate transport of pollutants as required by section 110(a)(2)(D); "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision," 74 FR 21639 (Apr. 18, 2011) (the EPA issued a SIP call to one state requiring it to rectify several very specific SIP provisions).

requirements is causally connected to a particular adverse impact. For example, the plain language of CAA section 110(k)(5) does not require direct causal evidence that excess emissions have occurred during a specific malfunction at a specific source and have literally caused a violation of the NAAQS in order to conclude that the SIP provision is substantially inadequate.[75] A SIP provision that purports to exempt a source from compliance with applicable emission limitations during SSM events, contrary to the requirements of the CAA for continuous emission limitations, does not become legally permissible merely because there is not definitive evidence that any excess emissions have resulted from the exemption and have literally caused a specific NAAQS violation.[76]

Similarly, the EPA does not interpret CAA section 110(k)(5) to require direct causal evidence that a SIP provision that improperly undermines enforceability of the SIP has resulted in a specific failed enforcement attempt by any party. A SIP provision that has the practical effect of barring enforcement by the EPA or through a citizen suit, either because it would bar enforcement if an air agency elects to grant a discretionary exemption or to exercise its own enforcement discretion, is inconsistent with fundamental requirements of the CAA.[77] Such a provision also does not become legally permissible merely because there is not definitive evidence that the state's action literally undermined a specific attempted enforcement action by other parties. Indeed, the EPA notes that these impediments to effective enforcement likely have a chilling effect on potential enforcement in general. The possibility for effective enforcement of emission limitations in SIPs is itself an important principle of the CAA, as embodied in CAA sections 113 and 304.

The EPA's interpretation of CAA section 110(k)(5) is that the fundamental integrity of the CAA's SIP process and structure are undermined if emission limitations relied upon to meet CAA requirements related to protection of public health and the environment can be violated without potential recourse. For example, the EPA does not believe that it is authorized to issue a SIP call to rectify an impermissible automatic exemption provision only after a violation of the NAAQS has occurred, or only if that NAAQS violation can be directly linked to the excess emissions that resulted from the impermissible automatic exemption by a particular source on a particular day. If the SIP contains a provision that is inconsistent with fundamental requirements of the CAA, that renders the SIP provision substantially inadequate.

The EPA notes that CAA section 110(k)(5) can also be an appropriate tool to address ambiguous SIP provisions that could be read by a court in a way that would violate the requirements of the CAA. For example, if an existing SIP provision concerning the state's exercise of enforcement discretion is sufficiently ambiguous that it could be construed to preclude enforcement by the EPA or through a citizen suit if the state elects to deem a given SSM event not a violation, then that could render the provision substantially inadequate by interfering with the enforcement structure of the CAA.[78] If a court could construe the ambiguous SIP provision to bar enforcement, the EPA believes that it may be appropriate to take action to eliminate that uncertainty by requiring the state to revise the ambiguous SIP provision. Under such circumstances, it may be appropriate for the EPA to issue a SIP call to assure that the SIP provisions are sufficiently clear and consistent with CAA requirements on their face.[79]

In this instance, the Petition raised questions concerning the adequacy of existing SIP provisions that pertain to the treatment of excess emissions during SSM events. The SIP provisions identified by the Petitioner generally fall into four major categories: (i) Automatic exemptions; (ii) exemptions as a result of director's discretion; (iii) provisions that appear to bar enforcement by the EPA or through a citizen suit if the state decides not to enforce through exercise of enforcement discretion; and (iv) affirmative defense provisions that appear to be inconsistent with the CAA and the EPA's SSM Policy. The EPA believes that each of these types of SIP deficiency potentially justifies a SIP call pursuant to CAA section 110(k)(5), if the SIP provision is as the Petitioner describes it.

2. Substantial Inadequacy of Automatic Exemptions

The EPA believes that SIP provisions that provide an automatic exemption from otherwise applicable emission limitations are substantially inadequate to meet CAA requirements. A typical SIP provision that includes an impermissible automatic exemption would provide that a source has to meet a specific emission limitation, except during startup, shutdown, and malfunction, and by definition any excess emissions during such events would not be violations and thus there could be no enforcement based on those excess emissions. The EPA's interpretation of CAA requirements for SIP provisions has been reiterated multiple times through the SSM Policy and actions on SIP submissions that pertain to this issue. The EPA's longstanding view is that SIP provisions that include automatic exemptions for excess emissions during SSM events, such that the excess emissions during those events are not considered violations of the applicable emission limitations, do not meet CAA requirements. Such exemptions undermine the protection of the NAAQS and PSD increments and fail to meet other fundamental requirements of the CAA.

The EPA interprets CAA sections 110(a)(2)(A) and 110(a)(2)(C) to require that SIPs contain "emission limitations" to meet CAA requirements. Pursuant to CAA section 302(k), those emission

[75] *See, US Magnesium, LLC* v. *EPA*, 690 F.3d 1157 (10th Cir. 2012) (upholding the EPA's interpretation of section 110(k)(5) to authorize a SIP call when the SIP provisions are inconsistent with CAA requirements).

[76] The EPA notes that the GHG SIP call did not require "proof" that the failure of a state to address GHGs in a given PSD permit "caused" particularized environmental impacts; it was sufficient that the state's SIP fails to meet the current fundamental legal requirements for regulation of GHGs in accordance with the CAA. *See*, "Action to Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call; Final Rule," 75 FR 77698 (Dec. 13, 2010).

[77] *See*, "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision," 74 FR 21639 at 21641 (Apr. 18, 2011); *see also, US Magnesium, LLC* v. *EPA*, 690 F.3d 1157, 1168 (10th Cir. 2012) (upholding the EPA's interpretation of section 110(k)(5) to authorize a SIP call when the state's SIP provision worded so that state decisions whether a given excess emissions event constituted a violation interfered with enforcement by the EPA or citizens for such event).

[78] Courts have on occasion interpreted SIP provisions to limit the EPA's enforcement authority as a result of ambiguous SIP provisions. *See, e.g., U.S.* v. *Ford Motor Co.*, 736 F.Supp. 1539 (W.D. Mo. 1990) and *U.S.* v. *General Motors Corp.*, 702 F. Supp. 133 (N.D. Texas 1988) (the EPA could not pursue enforcement of SIP emission limitations where states had approved alternative emission limitations under procedures the EPA had approved in the SIP); *Florida Power & Light Co.* v. *Costle*, 650 F.2d 579, 588 (5th Cir. 1981) (the EPA to be accorded no discretion in interpreting state law). The EPA does not agree with the holdings of these cases, but they illustrate why it is reasonable to eliminate any uncertainty about enforcement authority by requiring a state to remove or revise a SIP provision that could be read in a way inconsistent with the requirements of the CAA.

[79] *See, US Magnesium, LLC* v. *EPA*, 690 F.3d 1157, 1170 (10th Cir. 2012) (upholding the EPA's use of SIP call authority in order to clarify language in the SIP that could be read to violate the CAA, even if a court has not yet interpreted the language in that way).

limitations must be "continuous." Automatic exemptions from otherwise applicable emission limitations thus render those limits less than continuous as required by CAA sections 110(a)(2)(A) and 110(a)(2)(C), thereby inconsistent with a fundamental requirement of the CAA and thus substantially inadequate as contemplated in CAA section 110(k)(5).

This inadequacy has far-reaching impacts. For example, air agencies rely on emission limitations in SIPs in order to provide for attainment and maintenance of the NAAQS. These emission limitations are basic building blocks for SIPs, often used by air agencies to meet various requirements including: (i) In the estimates of emissions for emissions inventories; (ii) in the determination of what level of emissions meets various statutory requirements such as "reasonably available control measures" in nonattainment SIPs or "best available retrofit technology" in regional haze SIPs; and (iii) in critical modeling exercises such as attainment demonstration modeling for nonattainment areas or increment use for PSD permitting purposes. All of these uses typically assume continuous source compliance with applicable emission limitations.

Because the NAAQS are not directly enforceable against individual sources, air agencies rely on the adoption and enforcement of these generic and specific emission limits in SIPs in order to provide for attainment and maintenance of the NAAQS, protection of PSD increments, protection of visibility, and other CAA requirements. Automatic exemption provisions for excess emissions eliminate the possibility of enforcement for what would otherwise be clear violations of the relied-upon emission limitations and thus eliminate any opportunity to obtain injunctive relief that may be needed to protect the NAAQS or meet other CAA requirements. Likewise, the elimination of any possibility for penalties for what would otherwise be clear violations of the emission limitations, regardless of the conduct of the source, eliminates any opportunity for penalties to encourage appropriate design, operation, and maintenance of sources and efforts by source operators to prevent and to minimize excess emissions in order to protect the NAAQS or to meet other CAA requirements. Removal of this monetary incentive to comply with the SIP reduces a source's incentive to design, operate, and maintain its facility to meet emission limitations at all times.

3. Substantial Inadequacy of Director's Discretion Exemptions

The EPA believes that SIP provisions that allow discretionary exemptions from otherwise applicable emission limitations are substantially inadequate to meet CAA requirements for the same reasons as automatic exemptions, but for additional reasons as well. A typical SIP provision that includes an impermissible "director's discretion" component would purport to authorize air agency personnel to modify existing SIP requirements under certain conditions, *e.g.*, to grant a variance from an otherwise applicable emission limitation if the source could not meet the requirement in certain circumstances.[80] If such provisions are sufficiently specific, provide for sufficient public process, and are sufficiently bounded, so that it is possible to anticipate at the time of the EPA's approval of the SIP provision how that provision will actually be applied and the potential adverse impacts thereof, then such a provision might meet basic CAA requirements. In essence, if it is possible to anticipate and evaluate in advance how the exercise of enforcement discretion could impact compliance with other CAA requirements, then it may be possible to determine in advance that the pre-authorized exercise of director's discretion will not interfere with other CAA requirements, such as providing for attainment and maintenance of the NAAQS. Most director's discretion-type provisions cannot meet this basic test.

Unless it is possible at the time of the approval of the SIP provision to anticipate and analyze the impacts of the potential exercise of the director's discretion, such provisions functionally could allow *de facto* revisions of the approved provisions of the SIP without complying with the process for SIP revisions required by the CAA. Sections 110(a)(1) and (2) of the CAA impose procedural requirements on states that seek to amend SIP provisions. The elements of CAA section 110(a)(2) and other sections of the CAA, depending upon the subject of the SIP provision at issue, impose substantive requirements that states must meet in a SIP revision. Section 110(i) of the CAA prohibits modification of SIP requirements for stationary sources by either the state or the EPA, except through specified processes.[81] Section 110(k) of the CAA imposes procedural and substantive requirements on the EPA for action upon any SIP revision. Sections 110(l) and 193 of the CAA both impose additional procedural and substantive requirements on the state and the EPA in the event of a SIP revision. Chief among these many requirements for a SIP revision would be the necessary demonstration that the SIP revision in question would not interfere with any requirement concerning attainment and reasonable further progress or "any other applicable requirement of" the CAA to meet the requirements of CAA section 110(l).

Congress presumably imposed these many explicit requirements in order to assure that there is adequate public process at both the air agency and federal level for any SIP revision, and to assure that any SIP revision meets the applicable substantive requirements of the CAA. Although no provision of the CAA explicitly addresses whether a "director's discretion" provision is acceptable by name, the EPA interprets the statute to prohibit such provisions unless they would be consistent with the statutory and regulatory requirements that apply to SIP revisions.[82] A SIP provision that

[80] The EPA notes that problematic "director's discretion" provisions are not limited only to those that purport to authorize alternative emission limitations from those required in a SIP. Other problematic director's discretion provisions could include those that purport to provide for discretionary changes to other substantive requirements of the SIP, such as applicability, operating requirements, recordkeeping requirements, monitoring requirements, test methods, and alternative compliance methods.

[81] Section 110(i) of the Act states that "no order, suspension, plan revision or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator" except in compliance with the CAA's requirements for promulgation or revision of a plan, with limited exceptions. *See, e.g.*, "Approval and Disapproval and Promulgation of Air Quality Implementation Plans; Colorado; Revisions to Regulation 1; Notice of proposed rulemaking," 75 FR 42342 at 42344 (July 21, 2010) (proposing to disapprove "director discretion" provisions as inconsistent with CAA requirements and noting that "[s]ection 110(i) specifically prohibits States, except in certain limited circumstances, from taking any action to modify any requirement of a SIP with respect to any stationary source, except through a SIP revision"), finalized as proposed at 76 FR 4540 (Jan. 26, 2011); "Corrections to the California State Implementation Plan," 69 FR 67062 at 67063 (Nov. 16, 2004) (noting that "a state-issued variance, though binding as a matter of State law, does not prevent EPA from enforcing the underlying SIP provisions unless and until EPA approves that variance as a SIP revision"); *Industrial Environmental Association* v. *Browner*, No. 97–71117 at n. 2 (9th Cir. May 26, 2000) (noting that the EPA has consistently treated individual variances granted under state variance provisions as "modifications of the SIP requiring independent EPA approval").

[82] *See, e.g.*, EPA's implementing regulations at 40 CFR 51.104(d) ("In order for a variance to be considered for approval as a revision to the [SIP], the State must submit it in accordance with the requirements of this section") and 51.105 ("Revisions of a plan, or any portion thereof, will not be considered part of an applicable plan until

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purports to give broad and unbounded director's discretion to alter the existing legal requirements of the SIP with respect to meeting emission limitations would be tantamount to allowing a revision of the SIP without meeting the applicable procedural and substantive requirements for such a SIP revision.

For this reason, the EPA has long discouraged the creation of new SIP provisions containing an impermissible director's discretion feature and has also taken actions to remove existing SIP provisions that it had previously approved in error.[83] In recent years, the EPA has also recommended that if an air agency elects to have SIP provisions that contain a director's discretion feature consistent with CAA requirements, then the provisions must be structured so that any resulting variances or other deviations from the SIP requirements have no federal law validity, unless and until the EPA specifically approves that exercise of the director's discretion as a SIP revision. Barring such a later ratification by the EPA through a SIP revision, the exercise of director's discretion is only valid for state (or tribal) law purposes and would have no bearing in the event of an action to enforce the provision of the SIP as it was originally approved by the EPA.

The EPA's evaluation of the specific SIP provisions of this type identified in the Petition indicates that none of them provide sufficient process or sufficient bounds on the exercise of director's discretion to be permissible. Most on their face would allow potentially limitless exemptions with potentially dramatic adverse impacts inconsistent with the objectives of the CAA. More importantly, however, each of the identified SIP provisions goes far beyond the limits of what might theoretically be a permissible director's discretion provision by authorizing state personnel to create case-by-case exemptions from the applicable emission limitations from the requirements of the SIP for excess emissions during SSM events. Given that the EPA interprets the CAA not to allow exemptions from SIP emission limitations for excess emissions during SSM events in the first instance, it follows that providing such exemptions through the mechanism of director's discretion provision is also not permissible and compounds the problem.

As with automatic exemptions for excess emissions during SSM events, a provision that allows discretionary exemptions would not meet the statutory requirements of CAA sections 110(a)(2)(A) and 110(a)(2)(C) that require SIPs to contain "emission limitations" to meet CAA requirements. Pursuant to CAA section 302(k), those emission limitations must be "continuous." Discretionary exemptions from otherwise applicable emission limitations render those limits less than continuous, as is required by CAA sections 110(a)(2)(A) and 110(a)(2)(C), and thereby inconsistent with a fundamental requirement of the CAA and thus substantially inadequate as contemplated in section CAA 110(k)(5). Such exemptions undermine the objectives of the CAA such as protection of the NAAQS and PSD increments, and they fail to meet other fundamental requirements of the CAA.

In addition, discretionary exemptions undermine effective enforcement of the SIP by the EPA or through a citizen suit, because often there may have been little or no public process concerning the exercise of director's discretion to grant the exemptions, or easily accessible documentation of those exemptions, and thus even ascertaining the possible existence of such *ad hoc* exemptions will further burden parties who seek to evaluate whether a given source is in compliance or to pursue enforcement if it appears that the source is not. Where there is little or no public process concerning such *ad hoc* exemptions, or inadequate access to relevant documentation of those exemptions, enforcement by the EPA or through a citizen suit may be severely compromised. As explained in the 1999 SSM Guidance, the EPA does not interpret the CAA to allow SIP provisions that would allow the exercise of director's discretion concerning violations to bar enforcement by the EPA or through a citizen suit. The exercise of director's discretion to exempt conduct that would otherwise constitute a violation of the SIP would interfere with effective enforcement of the SIP. Such provisions are inconsistent with and undermine the enforcement structure of the CAA provided in CAA sections 113 and 304, which provide independent authority to the EPA and citizens to enforce SIP provisions, including emission limitations. Thus, SIP provisions that allow discretionary exemptions from applicable SIP emission limitations through the exercise of director's discretion are substantially inadequate to comply with CAA requirements as contemplated in CAA section 110(k)(5).

4. Substantial Inadequacy of Improper Enforcement Discretion Provisions

The EPA believes that SIP provisions that pertain to enforcement discretion but could be construed to bar enforcement by the EPA or through a citizen suit if the air agency declines to enforce are substantially inadequate to meet CAA requirements. A typical SIP provision that includes an impermissible enforcement discretion provision specifies certain parameters for when air agency personnel should pursue enforcement action, but is worded in such a way that the air director's decision defines what constitutes a "violation" of the emission limitation for purposes of the SIP, *i.e.*, by defining what constitutes a violation, the air agency's own enforcement discretion decisions are imposed on the EPA or citizens.[84]

The EPA's longstanding view is that SIP provisions cannot enable an air agency's decision concerning whether or not to pursue enforcement to bar the ability of the EPA or the public to enforce applicable requirements.[85] Such enforcement discretion provisions in a SIP would be inconsistent with the enforcement structure provided in the CAA. Specifically, the statute provides explicit independent enforcement authority to the EPA under CAA section 113 and to citizens under CAA section 304. Thus, the CAA contemplates that the EPA and citizens have authority to pursue enforcement for a violation even if the air agency elects not to do so. The EPA, citizens, and any court in which they seek to pursue an enforcement claim for violation of SIP requirements must retain the authority to evaluate independently whether a source's violation of an emission limitation

such revisions have been approved by the Administrator in accordance with this part.").

[83] *See, e.g.*, "Approval and Disapproval and Promulgation of Air Quality Implementation Plans; Colorado; Revisions to Regulation 1," 76 FR 4540 (Jan. 26, 2011) (partial disapproval of SIP submission based on inclusion of impermissible director's discretion provisions); "Correction of Implementation Plans; American Samoa, Arizona, California, Hawaii, and Nevada State Implementation Plans; Notice of proposed rulemaking," 61 FR 38664 (July 25, 1996) (proposed SIP correction to remove, pursuant to CAA section 110(k)(6), several variance provisions from American Samoa, Arizona, California, Hawaii, and Nevada SIPs), finalized at 62 FR 34641 (June 27, 1997); "Approval and Promulgation of Implementation Plans; Corrections to the Arizona and Nevada State Implementation Plans," 74 FR 57051 (Nov. 3, 2009) (direct final rulemaking to remove, pursuant to CAA section 110(k)(6), variance provisions from Arizona and Nevada SIPs).

[84] *See, e.g.*, "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision," 75 FR 70888 at 70892 (Nov. 19, 2010). The SIP provision at issue provided that information concerning a malfunction "shall be used by the executive secretary in determining whether a violation has occurred and/or the need of further enforcement action." This SIP language appeared to give the state official exclusive authority to determine whether excess emissions constitute a violation.

[85] *See*, 1999 SSM Guidance at 3.

warrants enforcement action. Potential for enforcement by the EPA or through a citizen suit provides an important safeguard in the event that the air agency lacks resources or ability to enforce violations and provides additional deterrence. Accordingly, a SIP provision that operated to eliminate the authority of the EPA or the public to pursue enforcement actions because the air agency elects not to, would undermine the enforcement structure of the CAA and would thus be substantially inadequate to meet fundamental requirements in CAA sections 113 and 304.

5. Substantial Inadequacy of Deficient Affirmative Defense Provisions

The EPA believes that SIP provisions that provide inappropriate affirmative defenses for excess emissions during SSM events are substantially inadequate to meet CAA requirements. A typical SIP provision that includes an impermissible affirmative defense provision could contain several deficiencies simultaneously, even though it may superficially resemble such a defense and actually contain the term "affirmative defense." There are a number of ways in which such provisions can be deficient, including: (i) Extending the affirmative defense to injunctive relief; (ii) not including sufficient criteria to make the affirmative defense appropriately narrow; (iii) imposing the affirmative defense provision on federal technology-based emission limitations in the SIP; and (iv) providing an affirmative defense to startup, shutdown, or other planned and routine modes of source operation.

First, the EPA interprets the CAA to allow only those affirmative defense provisions that provide a potential for relief from civil penalties and not those that provide relief from injunctive relief as well. As explained in more detail in section IV of this notice, the EPA interprets the provisions of CAA section 110(a) to allow affirmative defenses only in certain narrow circumstances, as a means of balancing the obligations of sources to meet emission limitations continuously as required by CAA section 302(k) with the practical reality that despite the most diligent of efforts, a source may violate emission standards under certain limited circumstances beyond the source's control. For sources that meet the conditions for an affirmative defense, the EPA believes that it is appropriate to provide relief only from monetary penalties. This limitation assures that the EPA and air agencies remain able to meet fundamental CAA requirements such as attainment and maintenance of the NAAQS, protection of PSD increments, protection of visibility, and other CAA requirements.

By contrast, because SIP provisions are intended to meet fundamental CAA objectives including attainment and maintenance of the NAAQS, it would be inappropriate to eliminate the availability of injunctive relief for violations, in order to ensure that the necessary emissions reductions could be obtained through changes at the source or in source operation should that be necessary. In this way, the EPA believes that affirmative defense provisions applicable only to monetary penalties can meet the requirements of CAA sections 110(a) and 302(k) and the enforcement structure provided in CAA sections 113 and 304. Failure to preserve the availability of injunctive relief for violations would thus be substantially inadequate to meet CAA requirements.

Second, the EPA interprets the CAA to allow only those affirmative defense provisions that are narrowly drawn to provide relief under appropriate circumstances where the event was entirely beyond the control of the owner or operator of the source and for which the source must have taken all practicable steps to prevent and to minimize the excess emissions that result from the event. Through the criteria in the 1999 SSM Guidance, the EPA has recommended the conditions that it considers appropriate for an approvable SIP provision in order to ensure that the affirmative defense is available to sources that warrant relief from monetary penalties otherwise required by the CAA. Affirmative defense provisions that are consistent with these criteria would be appropriately narrowly drawn. Affirmative defense provisions that do not address these criteria adequately, however, would potentially shield a source from CAA statutory penalties in circumstances that are not warranted.

For example, an affirmative defense provision that did not impose a burden upon the source to establish that the violation was not the result of an event that could have been prevented through proper maintenance would not serve to encourage better maintenance. Similarly, an affirmative defense provision that failed to impose a burden upon the source to establish that it took all possible steps to minimize the effect of the violation on ambient air quality, the environment, and human health, would not serve to encourage diligence in rectifying the malfunction as quickly and effectively as possible. By addressing the recommended criteria adequately, a state can develop a narrow provision that appropriately balances the requirement for continuous compliance against the reality that there may be limited circumstances beyond the source's control that justify relief from monetary penalties. The EPA believes that failure to have an affirmative defense provision that is sufficiently narrowly drawn would fail to meet the requirements of CAA sections 110(a) and 302(k) and the enforcement structure provided in CAA sections 113 and 304. Failure to have a sufficiently narrow affirmative defense would thus be substantially inadequate to meet CAA requirements.

Third, the EPA interprets the CAA to preclude SIP provisions that would create affirmative defense provisions applicable to federal regulations that an air agency may have copied into its SIP or incorporated by reference in order to take credit for resulting emissions reductions for SIP planning purposes or to receive delegation of federal authority, such as NSPS or NESHAP. To the extent that any affirmative defense appropriate for these technology-based standards is warranted, the federal standards contained in the EPA's regulations already specify the appropriate affirmative defense. Creating affirmative defenses that do not exist in such federal technology-based standards, or providing different affirmative defenses in addition to those that do exist, would be inappropriate. Similarly, reliance on inappropriate affirmative defenses in the context of PSD permitting or nonattainment New Source Review (NSR) permitting programs could likewise be problematic.

Fourth, the EPA interprets the CAA to allow only affirmative defense provisions that are available for events that are entirely beyond the control of the owner or operator of the source. Thus, an affirmative defense may be appropriate for events like malfunctions, which are sudden and unavoidable events that cannot be foreseen or planned for. The underlying premise for an affirmative defense provision is that the source is properly designed, operated, and maintained, and could not have taken action to prevent the exceedance. Because the qualifying source could not have foreseen or prevented the event, the affirmative defense is available to provide relief from monetary penalties that could result from an event beyond the control of the source.

The legal and factual basis that supports the concept of an affirmative defense for malfunctions does not support providing and an affirmative defense for normal modes of operation

like startup and shutdown. Such events are planned and predictable. The source should be designed, operated, and maintained to comply with applicable emission limitations. Because startup and shutdown periods are part of a source's normal operations, the same approach to compliance with, and enforcement of, applicable emission limitations during those periods should apply as otherwise applies during a source's normal operations. If justified, the state can develop special emission limitations or control measures that apply during startup and shutdown if the source cannot meet the otherwise applicable emission limitations in the SIP.

Even if a source is a suitable candidate for distinct SIP emission limitations during startup and shutdown, however, that does not justify the creation of an affirmative defense in the case of excess emissions during such periods. Because these events are planned, the EPA believes that sources should be able to comply with applicable emission limitations during these periods of time. To provide an affirmative defense for violations that occur during planned and predictable events for which the source should have been expected to comply is tantamount to providing relief from civil penalties for a planned violation. The EPA believes that affirmative defense provisions that include periods of normal source operation that are within the control of the owner or operator of the source, such as planned startup and shutdown, would be inconsistent with the requirements of CAA sections 110(a) and 302(k) and the enforcement structure provided in CAA sections 113 and 304. An affirmative defense provision that expands the availability of the defense to planned events such as startup and shutdown would thus be substantially inadequate to meet CAA requirements.

B. SIP Call Process Under Section 110(k)(5)

Section 110(k)(5) of the CAA provides the EPA with authority to determine whether a SIP is substantially inadequate to attain or maintain the NAAQS or otherwise comply with any requirement of the CAA. Where the EPA makes such a determination, the EPA then has a duty to issue a SIP call.

In addition to providing general authority for a SIP call, CAA section 110(k)(5) sets forth the process and timing for such an action. First, the statute requires the EPA to notify the state of the final finding of substantial inadequacy. The EPA typically provides notice to states by a letter from the Assistant Administrator for the Office of Air and Radiation to the appropriate state officials in addition to publication of the final action in the **Federal Register**.

Second, the statute requires the EPA to establish "reasonable deadlines (not to exceed 18 months after the date of such notice)" for the state to submit a corrective SIP submission to eliminate the inadequacy in response to the SIP call. The EPA proposes and takes comment on the schedule for the submission of corrective SIP revisions in order to ascertain the appropriate timeframe, depending on the nature of the SIP inadequacy.

Third, the statute requires that any finding of substantial inadequacy and notice to the state be made public. By undertaking a notice-and-comment rulemaking, the EPA assures that the air agency, affected sources, and members of the public all are adequately informed and afforded the opportunity to participate in the process. Through this proposal notice and the later final notice, the EPA intends to provide a full evaluation of the issues raised by the Petition and to use this process as a means of giving clear guidance concerning SIP provisions relevant to SSM events that are consistent with CAA requirements.

If the state fails to submit the corrective SIP revision by the deadline that the EPA finalizes as part of the SIP call, CAA section 110(c) authorizes the EPA to "find[] that [the] State has failed to make a required submission." [86] Once the EPA makes such a finding of failure to submit, CAA section 110(c)(1) requires the EPA to "promulgate a Federal implementation plan at any time within 2 years after the [finding] * * * unless the State corrects the deficiency, and [the EPA] approves the plan or plan revision, before [the EPA] promulgates such [FIP]." Thus, if the EPA finalizes a SIP call and then finds that the air agency failed to submit a complete SIP revision that responds to the SIP call, or if the EPA disapproves such SIP revision, then the EPA will have an obligation under CAA section 110(c)(1) to promulgate a FIP no later than 2 years from the date of the finding or the disapproval, if the deficiency has not been corrected before that time.[87]

The finding of failure to submit a revision in response to a SIP call, or the EPA's disapproval of that corrective SIP revision, can also trigger sanctions under CAA section 179. If a state fails to submit a complete SIP revision that responds to a final SIP call, CAA section 179(a) provides for the EPA to issue a finding of state failure. Such a finding starts mandatory 18-month and 24-month sanctions clocks. The two sanctions that apply under CAA section 179(b) are the 2-to-1 emission offset requirement for all new and modified major sources subject to the nonattainment new source review program and restrictions on highway funding. However, section 179 leaves it to the EPA to decide the order in which these sanctions apply. The EPA issued an order of sanctions rule in 1994 but did not specify the order of sanctions where a state fails to submit or submits a deficient SIP revision in response to a SIP call.[88] As the EPA has done in other SIP calls, the EPA proposes that the 2-to-1 emission offset requirement will apply for all new sources subject to the nonattainment new source review program 18 months following such finding or disapproval unless the state corrects the deficiency before that date. The EPA proposes that the highway funding restrictions sanction will also apply 24 months following such finding or disapproval unless the state corrects the deficiency before that date. The EPA is proposing that the provisions in 40 CFR 52.31 regarding staying the sanctions clock and deferring the imposition of sanctions would also apply.

Mandatory sanctions under CAA section 179 generally apply only in nonattainment areas. By its definition, the emission offset sanction applies only in areas required to have a part D NSR program, typically areas designated nonattainment. Section 179(b)(1) expressly limits the highway funding restriction to nonattainment areas. Additionally, the EPA interprets the section 179 sanctions to apply only in the area or areas of the state that are subject to or required to have in place the deficient SIP and for the pollutant or pollutants the specific SIP element addresses. For example, if the deficient provision applies statewide and applies for all NAAQS pollutants, then the mandatory sanctions would apply in all areas designated nonattainment for all NAAQS within the state. In this case, the EPA will evaluate the geographic scope of potential sanctions at the time it makes a final determination whether the state's SIP is substantially inadequate and issues a SIP call, as this

[86] CAA section 110(c)(1)(A).

[87] The 2-year deadline does not necessarily apply to FIPs following disapproval of a tribal implementation plan.

[88] *See*, "Selection of Sequence of Mandatory Sanctions for Findings Made Pursuant to Section 179 of the Clean Air Act," 59 FR 39832 (Aug. 4, 1994), codified at 40 CFR 52.31.

may vary depending upon the provisions at issue.

C. SIP Call Timing Under Section 110(k)(5)

If the EPA finalizes a proposed finding of substantial inadequacy and a proposed SIP call for any state, CAA section 110(k)(5) requires the EPA to establish a SIP submission deadline by which the state must make a SIP submission to rectify the identified deficiency. Pursuant to CAA section 110(k)(5), the EPA has authority to set a SIP submission deadline up to 18 months from the date of the final finding of inadequacy.

The EPA is proposing that if it promulgates a final finding of inadequacy and a SIP call for a state, the EPA will establish a date 18 months from the date of promulgation of the final finding for the state to respond to the SIP call. If, for example, the EPA's final findings are signed and disseminated in August 2013, then the SIP submission deadline for each of the states subject to the final SIP call would fall in February 2015. Thereafter, the EPA will review the adequacy of that new SIP submission in accordance with the CAA requirements of sections 110(a), 110(k), 110(l), and 193, including the EPA's interpretation of the CAA reflected in the SSM Policy as clarified and updated through this rulemaking.

The EPA is proposing the maximum time permissible under the CAA for a state to respond to a SIP call. The EPA believes that it is appropriate to provide states with the maximum time allowable under CAA section 110(k)(5) in order to allow states sufficient time to make SIP revisions following their own SIP development process. The EPA considers this a reasonable time period for the affected states to revise their state regulations, provide for public input, process the SIP revision through the state's own procedures, and submit the SIP revision to the EPA. Such a schedule will allow for the necessary SIP development process to correct the deficiencies, yet still achieve the necessary SIP improvements as expeditiously as practicable. The EPA acknowledges that the longstanding existence of many of the provisions at issue, such as automatic exemptions for SSM events, may have resulted in undue reliance on them as a compliance mechanism by some sources. As a result, development of appropriate SIP revisions may entail reexamination of the applicable emission limitations themselves, and this process may require the maximum time allowed by the CAA. Nevertheless, the EPA encourages the affected states to make the necessary revisions in as timely a fashion as possible and encourages the states to work with the respective EPA Regional Office as they develop the SIP revisions.

The EPA notes that the SIP calls that it is proposing for affected states in this action would be narrow and apply only to the specific SIP provisions determined to be inconsistent with the requirements of the CAA. To the extent that a state is concerned that elimination of a particular aspect of an existing emission limitation, such as an impermissible exemption, will render that emission limitation more stringent than the state originally intended and more stringent than needed to meet the CAA requirements it was intended to address, the EPA anticipates that the state will revise the emission limitation accordingly, but without the impermissible exemption or other feature that necessitated the SIP call.

Finally, the EPA notes that its authority under CAA section 110(k)(5) does not extend to requiring a state to adopt a particular control measure in its SIP in response to the SIP call. Under principles of cooperative federalism, the CAA vests air agencies with substantial discretion to develop SIP provisions, so long as the provisions meet the legal requirements and objectives of the CAA.[89] Thus, the issuance of a SIP call should not be misconstrued as a directive to the state in question to adopt a particular control measure. The EPA is merely proposing to require that affected states make a SIP revision to remove or revise existing SIP provisions that fail to comply with fundamental requirements of the CAA. The states retain discretion to remove or revise those provisions as they determine best, so long as they bring their SIPs into compliance with the requirements of the CAA.[90]

[89] *See, Virginia, et al.* v. *EPA*, 108 F.3d 1397 (D.C. Cir. 1997) (SIP call remanded and vacated because, *inter alia*, the EPA had issued a SIP call that required states to adopt a particular control measure for mobile sources).

[90] Notwithstanding the latitude states have in developing SIP provisions, the EPA is required to assure that states meet the basic legal criteria for SIPs. *See, Michigan, et al.* v. *EPA*, 213 F.3d 663, 686 (D.C. Cir. 2000) (upholding NO_X SIP call because, *inter alia*, the EPA was requiring states to meet basic legal requirement that SIPs comply with section 110(a)(2)(D), not dictating the adoption of a particular control measure).

IX. What is the EPA proposing for each of the specific SIP provisions identified in the petition?

A. Overview of the EPA's Evaluation of Specific SIP Provisions

In reviewing the Petitioner's concerns with respect to the specific SIP provisions identified in the Petition, the EPA notes that most of the provisions relate to a small number of common issues. As the EPA acknowledges in section II.A of this notice, many of these provisions are as old as the original SIPs that the EPA approved in the early 1970s, when the states and the EPA had limited experience in evaluating the provisions' adequacy, enforceability, and consistency with CAA requirements.

In some instances the EPA does not agree with the Petitioner's reading of the provision in question, or with the Petitioner's conclusion that the provision is inconsistent with the requirements of the CAA. However, given the common issues that arise in the Petition for multiple states, there are some overarching conceptual points that merit discussion in general terms before delving into the facts and circumstances of the specific SIP provisions in each state. The EPA solicits comment on all aspects of this proposal.

1. Automatic Exemption Provisions

A significant number of provisions identified by the Petitioner pertain to existing SIP provisions that create automatic exemptions for excess emissions during periods of startup, shutdown, or malfunction. Occasionally, these provisions also pertain to exemptions for excess emission that occur during maintenance, load change, or other types of normal source operation. These provisions typically provide that a source subject to a specific SIP emission limitation is exempted from compliance during startup, shutdown, and malfunction, so that the excess emissions are defined as not violations. Often, these provisions are artifacts of the early phases of the SIP program, approved before state and EPA regulators recognized the implications of such exemptions. Whatever the genesis of these existing SIP provisions, however, these automatic exemptions from emission limitations are not consistent with the CAA, as the EPA has stated in its SSM Policy since at least 1982.

After evaluating the Petition, the EPA proposes to determine that a number of states have existing SIP provisions that create impermissible automatic exemptions for excess emissions during

malfunctions or during startup, shutdown, or other types of normal source operation. In those instances where the EPA agrees that a SIP provision identified by the Petitioner contains such an exemption contrary to the requirements of the CAA, the EPA is proposing to grant the Petition and accordingly to issue a SIP call to the appropriate state.

2. Director's Discretion Exemption Provisions

Another category of problematic SIP provision identified by the Petitioner is exemptions for excess emissions that, while not automatic, are exemptions for such emissions granted at the discretion of state regulatory personnel. In some cases, the SIP provision in question may provide some minimal degree of process and some parameters for the granting of such discretionary exemptions, but the typical provision at issue allows state personnel to decide unilaterally and without meaningful limitations that what would otherwise be a violation of the applicable emission limitation is instead exempt. Because the state personnel have the authority to decide that the excess emissions at issue are not a violation of the applicable emission limitation, such a decision would transform the violation into a non-violation, thereby barring enforcement by the EPA or others.

The EPA refers to this type of provision as a "director's discretion" provision, and the EPA interprets the CAA generally to forbid such provisions in SIPs because they have the potential to undermine fundamental statutory objectives such as the attainment and maintenance of the NAAQS and to undermine effective enforcement of the SIP. As discussed in sections VIII.A and IX of this notice, unbounded director's discretion provisions purport to allow unilateral revisions of approved SIP provisions without meeting the applicable statutory substantive and procedural requirements for SIP revisions. The specific SIP provisions at issue in the Petition (*see* section IX of this notice) are especially inappropriate because they purport to allow discretionary creation of case-by-case exemptions from the applicable emission limitations, when the CAA does not permit any such exemptions in the first instance. The practical impact of such provisions is that in effect they transform an enforcement discretion decision by the state (*e.g.*, that the excess emission from a given SSM event should be excused for some reason) into an exemption from compliance that also prevents enforcement by the EPA or through a citizen suit. The EPA's longstanding SSM Policy has interpreted the CAA to preclude SIP provisions in which a state's exercise of its own enforcement discretion bars enforcement by the EPA or through a citizen suit. Where the EPA agrees that a SIP provision identified by the Petitioner contains such a discretionary exemption contrary to the requirements of the CAA, the EPA is proposing to grant the Petition and to call for the state to rectify the problem.

3. State-Only Enforcement Discretion Provisions

The Petitioner identified existing SIP provisions in many states that ostensibly pertain to parameters for the exercise of enforcement discretion by state personnel for violations due to excess emissions during SSM events. The EPA's SSM Policy has consistently encouraged states to utilize traditional enforcement discretion within appropriate bounds for such violations and, in the 1982 SSM Guidance, explicitly recommended criteria that states might consider in the event that they elected to formalize their enforcement discretion with provisions in the SIP. The intent has been that such enforcement discretion provisions in a SIP would be "state-only," meaning that the provisions apply only to the state's own enforcement personnel and not to the EPA or to others.

The EPA has determined that a number of states have SIP provisions that, when evaluated carefully, could reasonably be construed to allow the state to make enforcement discretion decisions that would purport to foreclose enforcement by the EPA under CAA section 113 or by citizens under section 304. In those instances where the EPA agrees that a specific provision could have the effect of impeding adequate enforcement of the requirements of the SIP by parties other than the state, the EPA is proposing to grant the Petition and to take action to rectify the problem. By contrast, where the EPA's evaluation indicates that the existing provision on its face or as reasonably construed could not be read to preclude enforcement by parties other than the state, the EPA is proposing to deny the Petition, and the EPA is taking comment on this issue in particular to assure that the state and the EPA have a common understanding that the provision does not have any impact on potential enforcement by the EPA or through a citizen suit. This process should serve to ensure that there is no misunderstanding in the future that the correct reading of the SIP provision would not bar enforcement by the EPA or through a citizen suit when the state elected to exercise its own enforcement discretion.

The EPA notes that another method by which to eliminate any potential ambiguity about the meaning of these enforcement discretion provisions would be for the state to revise its SIP to remove the provisions. Because these provisions are only applicable to the state, the EPA's current view is that they need not be included within the SIP. Thus, the EPA supports states that elect to revise their SIPs to remove these provisions to avoid any unnecessary confusion.

4. Adequacy of Affirmative Defense Provisions

In addition to its overarching request that the EPA revise its interpretation of the CAA and forbid any form of affirmative defense, the Petitioner also identified specific existing affirmative defense provisions in SIPs that the Petitioner contended are not consistent with the EPA's SSM Policy. In general, these provisions are structured as affirmative defense provisions, but the Petitioner expressed concern that they fail to address some or all of the criteria for such provisions that the EPA recommended in the 1999 SSM Guidance.

In reviewing the claims of the Petitioner with respect to this type of alleged SIP inadequacy, the EPA is reevaluating each of the challenged affirmative defense provisions on the merits to determine whether it provides the types of assurances that the EPA has recommended as necessary to meet CAA requirements. As the SSM Policy is guidance, it does not require any particular approach, but it does reflect the EPA's interpretation of the CAA with respect to what could constitute an acceptable affirmative defense provision. For each of these provisions identified by the Petitioner, the EPA proposes to grant or to deny the Petition, based on the EPA's evaluation as to whether the provision at issue provides adequate criteria to provide only a narrow affirmative defense for sources under certain circumstances consistent with the overarching CAA objectives, such as attaining and maintaining the NAAQS.[91] In addition, as discussed in section VII.C of this

[91] By definition, an affirmative defense provision in a SIP provides a source with a defense to assert in an enforcement proceeding. The source has the ability to establish whether or not it has met the legal and factual parameters for such affirmative defense, and that question will be decided by the trier of fact in the proceeding. The relevant circumstances in such a proceeding would thus include issues relevant to the parameters for affirmative defense provisions, as enumerated in section VII.B of this notice.

notice, the EPA is also proposing to grant the Petition with respect to any identified provision that creates an affirmative defense applicable during planned startup and shutdown events, because such provisions are not consistent with the requirements of the CAA.

5. Affirmative Defense Provisions Applicable to a "Source or Small Group of Sources"

The Petitioner specifically objected to existing provisions in SIPs for a few states that allow an affirmative defense for certain categories of sources to be based on an after-the-fact showing that the excess emissions during a particular SSM event did not cause a violation of the NAAQS or PSD increments. The Petitioner argued that these affirmative defense provisions are inconsistent with the CAA and with the EPA's own recommendations for affirmative defenses in the SSM Policy, because the provisions provide the possibility for an affirmative defense to be used by sources that would fall into the category of "a source or small group of sources that has the potential to cause an exceedance of the NAAQS or PSD increments." [92]

The EPA acknowledges that its 1999 SSM Guidance recommended against affirmative defense provisions in SIPs for sources that have the potential, either individually or in small groups, to have excess emissions during SSM events that could cause a violation of the NAAQS or PSD increments. The EPA recommended that states utilize an enforcement discretion approach, rather than create an affirmative defense provision, for such sources. However, the EPA's SSM Policy is guidance, and the facts and circumstances of a particular situation may justify adopting a different approach. The EPA has evaluated each of the affirmative defense provisions identified by the Petitioner on the facts and circumstances of the particular provision. For each of these provisions, the EPA proposes to grant or to deny the Petition, based on an evaluation of whether the specific provision at issue in an individual SIP contains adequate criteria to achieve the objective of providing only a narrow affirmative defense for sources under certain circumstances consistent with the overarching CAA objectives, such as attaining and maintaining the NAAQS. The criteria that the EPA recommends for an affirmative defense provision for malfunctions to be consistent with CAA requirements are restated in this notice at section VII.B, which also highlights EPA's view concerning case-by-case approval of affirmative defenses in the case of geographic areas and pollutants "where a single source or small group of sources has the potential to cause an exceedance of the NAAQS or PSD increments."

B. Affected States in EPA Region I

1. Maine

a. Petitioner's Analysis

The Petitioner first objected to a specific provision in the Maine SIP that provides an exemption for certain boilers from otherwise applicable SIP visible emission limits during startup and shutdown (06–096–101 Me. Code R. § 3).[93] The provision exempts violations of the otherwise applicable SIP emission limitations for boilers over a certain rated input capacity "during the first 4 hours following the initiation of cold startup or planned shutdown." The Petitioner recognized that this provision might operate as an affirmative defense because the exemption is only available once the person claiming an "exemption" establishes that the facility was being run to minimize emissions. The provision does not make clear who is authorized to determine whether the visible emission limits apply. The Petitioner argued that one plausible interpretation of this provision is that state officials are "authorized to decide that the exemption applies and therefore preclude enforcement by the EPA and by citizens." [94] The Petitioner argued that such an interpretation of this provision precluding enforcement by the EPA or citizens, both for civil penalties and injunctive relief, is forbidden by the EPA's interpretation of the CAA. Accordingly, the Petitioner requested that this provision be eliminated from the SIP.

Second, the Petitioner objected to a provision that empowers the state to "exempt emissions occurring during periods of unavoidable malfunction or unplanned shutdown from civil penalty under section 349, subsection 2" (06–096–101 Me. Code R. § 4). The Petitioner noted that the provision "clearly provides an exemption at the discretion of the department." [95] The Petitioner argued that such a provision provides exemptions from the otherwise applicable SIP emission limitations, and such exemptions are inconsistent with the requirements of the CAA and the EPA's SSM Policy. Further, the Petitioner argued that the provision precludes enforcement by the EPA or citizens, both for civil penalties and injunctive relief, and that the EPA's interpretation of the CAA would forbid such a provision.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, or malfunctions are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The EPA believes that inclusion of such an exemption in 06–096–101 Me. Code R. § 3 from the otherwise applicable SIP emission limitation for violations during the first 4 hours following cold startup or planned shutdown of boilers with a rated input capacity of more than 200 million BTU per hour is a substantial inadequacy and renders this specific SIP provision impermissible.

With respect to the Petitioner's concern that this exemption could preclude enforcement by the EPA or citizens, the EPA agrees that this is one of the critical reasons why such a provision is impermissible under the CAA. By having a SIP provision that defines what would otherwise be violations of the applicable emission limitations as non-violations, the state has effectively negated the ability of the EPA or the public to enforce against those violations.

The EPA also believes that even if 06–096–101 Me. Code R. § 3 is interpreted to allow the source to make the required demonstration only in the context of an enforcement proceeding, the conditions set forth in the provision do not render it an acceptable affirmative defense provision. As explained in sections IV and VII.C of this notice, the EPA believes that affirmative defenses are only permissible under the CAA in the

[92] *See*, 1999 SSM Guidance at 4, and Attachment at 2, 3, and 5. Footnote 2 to that document articulates the reasoning behind the EPA's recommendation against such provisions, at least for some sources and for some NAAQS.

[93] Petition at 43–44.

[94] Petition at 44.

[95] Petition at 44.

case of events that are beyond the control of the source, *i.e.*, malfunctions. Affirmative defense provisions are not appropriate in the case of planned source actions, such as cold startup or planned shutdown, because sources should be expected to comply with applicable emission limitations during those normal planned and predicted modes of source operation.

Finally, the EPA believes that 06–096–101 Me. Code R. § 4 is impermissible under the CAA as interpreted in the EPA's SSM Policy as an unbounded director's discretion provision. The provision authorizes a state official "to exempt emissions occurring during periods of unavoidable malfunction or unplanned shutdown from civil penalty under section 349, subsection 2." Although the reference to section 349, subsection 2 is to a Maine state penalty provision, the EPA believes that the provision is unclear as written. This provision could be read to mean that once the state official has exempted excess emissions during malfunctions from otherwise applicable SIP limitations, those excess emissions are not subject to any penalties, including penalties under CAA section 113. As discussed in section VII.A of this notice, such director's discretion provisions are impermissible. Such an interpretation would make the state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation, which could preclude enforcement by the EPA or the public who might disagree about whether enforcement action is warranted. Most importantly, however, the provision may be read to authorize the state official to create an exemption from the emission limitation, and such an exemption is impermissible in the first instance. The EPA believes that inclusion of an unbounded director's discretion provision in 06–096–101 Me. Code R. § 4 is thus a substantial inadequacy and renders this specific SIP provision impermissible for this reason.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to 06–096–101 Me. Code R. § 3. The EPA believes that this provision allows for exemptions from the otherwise applicable SIP emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, by creating these impermissible exemptions, the state has defined violations in a way that would interfere with effective enforcement by the EPA and the public for excess emissions during these events as provided in CAA sections 113 and 304. Even if the EPA were to consider 06–096–101 Me. Code R. § 3 to provide an affirmative defense rather than an automatic exemption, the provision is not a permissible affirmative defense provision consistent with the requirements of the CAA as interpreted in the EPA's recommendations in the EPA's SSM Policy.

The EPA also proposes to grant the Petition with respect to 06–096–101 Me. Code R. § 4. The EPA believes that this provision, as written, applies only to state penalties. However, the EPA is concerned that the provision could cause confusion among the public, the regulated community, and the courts, who might interpret the provision as applying to both state and federal penalties. Of course, such an interpretation would seem to allow for exemptions from otherwise applicable emission limitations through a state official's unilateral exercise of unbounded discretionary authority and therefore be inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions. To avoid any such misunderstanding, the EPA is proposing to find that these provisions are substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to these provisions.

2. New Hampshire

a. Petitioner's Analysis

The Petitioner objected to two generally applicable provisions in the New Hampshire SIP that allow emissions in excess of otherwise applicable SIP emission limitations during "malfunction or breakdown of any component part of the air pollution control equipment."[96] The Petitioner argued that the challenged provisions provide an automatic exemption for excess emissions during the first 48 hours when any component part of air pollution control equipment malfunctions (N.H. Code R. Env-A 902.03) and further provide that "[t]he director may * * * grant an extension of time or a temporary variance" for excess emissions outside of the initial 48-hour time period (N.H. Code R. Env-A 902.04). The Petitioner argued that N.H. Code R. Env-A 902.03 is an impermissible automatic exemption because it "provides that if certain conditions existed during a period of excess emissions, then those exceedances would not be considered violations."[97] The Petitioner argued that such exemptions are inconsistent with the requirements of the CAA and the EPA's SSM Policy. The Petitioner argued that the CAA and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations. The Petitioner further argued that both N.H. Code R. Env-A 902.03 and N.H. Code R. Env-A 902.04 appear "to authorize the division to allow [exemptions], which could be interpreted to preclude enforcement by EPA or citizens"[98] for the excess emissions that would otherwise be violations of applicable SIP emission limitations.

Second, the Petitioner objected to two specific provisions in the New Hampshire SIP which provide source-specific exemptions for periods of startup for "any process, manufacturing and service industry" (N.H. Code R. Env-A 1203.05) and for pre-June 1974 asphalt plants during startup, provided they are at 60-percent opacity for no more than 3 minutes (N.H. Code R. Env-A 1207.02).[99] The Petitioner recognized that EPA permits source category-specific emission limitations for startup and shutdown if certain conditions are met. The Petitioner argued, however, that "[o]f the seven criteria EPA considers adequate to justify a source specific emission limit during startup and shutdown, section 1207.02 arguably meets only one of them and section 1203.05 meets none at all."[100] The Petitioner thus requested that EPA require New Hampshire to remove both provisions from the SIP.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, or malfunctions are not violations are inconsistent with the

[96] Petition at 52–53.

[97] Petition at 52.

[98] Petition at 53.

[99] Petition at 52–53.

[100] Petition at 53.

fundamental requirements of the CAA with respect to emission limitations in SIPs. The first provision identified by the Petitioner, N.H. Code R. Env-A 902.03, explicitly states that "increased emissions shall be allowed" during "malfunction or breakdown of any component part of the air pollution control equipment." The third provision identified by the Petitioner, N.H. Code R. Env-A 1203.05, provides that applicable SIP emission limitations apply "for any process, manufacturing and service industry" "[e]xcept during periods of start-ups and warm-ups." Both of these provisions allow automatic exemptions during periods of startup from otherwise applicable SIP emission limitations for excess emissions and thus are inconsistent with the requirements of the CAA as interpreted in the EPA's SSM Policy. The EPA believes that inclusion of such exemptions from otherwise applicable SIP emission limitations in these provisions is a substantial inadequacy and renders these SIP provisions impermissible.

Similarly, N.H. Code R. Env-A 1203.05 does not appear to comply with the Act's requirements for source category-specific rules for startup and shutdown as interpreted in the EPA's SSM Policy. N.H. Code R. Env-A 1203.05 establishes a visible emissions limit for "any process, manufacturing and service industry" but further states that this limit does not apply during startups. Automatic exemptions from otherwise applicable SIP emission limitations for excess emissions during periods of startup are not permissible under the CAA. As discussed in section VII.A of this notice, states may elect to develop alternative emission limitations or other forms of enforceable control measures or techniques that apply during startup or shutdown, but exemptions for excess emissions during such periods are inconsistent with the fundamental requirements of the CAA.

Similarly, N.H. Code R. Env-A 1207.02 provided an alternate opacity limit, "60 percent opacity, No. 3 on the Ringelmann Smoke Chart," for pre-June 1974 asphalt plants during startups. The EPA believes that this alternate emissions limit does not meet the elements of the EPA's SSM Policy interpreting the CAA for establishing source-specific startup and shutdown alternative limits. However, after the Petitioner filed its Petition, the EPA acted on a SIP revision from New Hampshire correcting N.H. Code R. Env-A 1207.02 and renaming that provision as N.H. Code R. Env-A 2703.02. The N.H. Code R. Env-A 2703.02, as rewritten and submitted by New Hampshire, corrected the deficiencies identified by the Petitioner and removed the alternative limitations applicable during startups for pre-June 1974 asphalt plants. The EPA approved New Hampshire's SIP revision with respect to N.H. Code R. Env-A 2703.02 on August 22, 2012.[101] Thus, the Petitioner's objection to this provision is moot.

Finally, the EPA believes that N.H. Code R. Env-A 902.04 is impermissible under the CAA as interpreted in the EPA's SSM Policy, because it includes an unbounded director's discretion provision. The provision authorizes a state official to grant "an extension of time" to the time-limited exemption provided by N.H. Code R. Env-A 902.03 or a "temporary variance" to an applicable SIP emission limitation during malfunctions of air pollution control equipment. This provision could be read to mean that once the state official has granted a time extension or temporary variance for excess emissions during malfunctions from otherwise applicable SIP limitations, those excess emissions are not violations. As discussed in section VII.A of this notice, such director's discretion provisions are impermissible. Such an interpretation would make the state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation, which could preclude enforcement by the EPA or the public who might disagree about whether enforcement action is warranted. Most importantly, however, the provision may be read to authorize the state official to create an exemption from the emission limitation, and such an exemption is impermissible in the first instance. The EPA believes that inclusion of an unbounded director's discretion provision in N.H. Code R. Env-A 902.03 is thus a substantial inadequacy and renders this specific SIP provision impermissible for this reason.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to N.H. Code R. Env-A 902.03 and N.H. Code R. Env-A 1203.05. The EPA believes that both of these provisions allow for automatic exemptions from otherwise applicable emission limitations and that such outright exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, by creating these impermissible exemptions, the state has defined violations in a way that would interfere with effective enforcement by the EPA and citizens for excess emissions during these events as provided in CAA sections 113 and 304. For these reasons, the EPA is proposing to find that these provisions are substantially inadequate to meet CAA requirements and thus is proposing to issue a SIP call with respect to these provisions.

The EPA proposes to grant the Petition with respect to N.H. Code R. Env-A 902.04. The EPA believes that this provision allows for exemptions from otherwise applicable emission limitations through a state official's unilateral exercise of discretionary authority that is unbounded. Such provisions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For these reasons, the EPA is proposing to find that this provision is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

The EPA proposes to deny the Petition with respect to N.H. Code R. Env-A 1207.02. New Hampshire has corrected the inadequacy identified by the Petitioner, and the EPA approved the SIP revision. Therefore, the Petitioner's objection is moot.

3. Rhode Island

a. Petitioner's Analysis

The Petitioner objected to a generally applicable provision in the Rhode Island SIP that allows for a case-by-case petition procedure whereby a source can obtain a variance from state personnel under R.I. Gen. Laws § 23–23–15 to continue to operate during a malfunction of its control equipment that lasts more than 24 hours, if the source demonstrates that enforcement would constitute undue hardship without a corresponding benefit (25–4–13 R.I. Code R. § 16.2).[102] [103] The Petitioner argued that if the state grants the source's petition and provides a variance allowing the source to continue to operate, the facility could be excused from compliance with otherwise applicable SIP emission limitations

[101] *See*, 77 FR 50561 at 50608.

[102] Petition at 63–65.

[103] The EPA notes that the Petitioner also identified several additional provisions, 25–4–13 R.I. Code R. §§ 13.4.1(a), 27.2.3 and 25–4–39 R.I. Code R. §§ 39.5.4, 39.7.5(a), 39.7.6(b), 39.7.7(e), 39.7.8(f), 39.7.9(e), 39.7.11(c)(2), that it alleged are inconsistent with the CAA and the EPA's SSM Policy. However, the Petitioner did not request that the EPA address those provisions in its remedy request, and thus the EPA is not addressing those provisions in this action. The EPA may elect to evaluate those provisions in a later action.

during malfunction periods. The Petitioner argued that this provision could be read to preclude enforcement by the EPA or citizens in the event that the state elects not to treat the event as a violation of SIP emission limitations. Thus, the Petitioner argued, the provision is inconsistent with the CAA and the EPA's SSM Policy because it allows the state to make a unilateral decision that the excess emissions were not a violation and thus purports to bar enforcement for the excess emissions by the EPA and citizens.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that excess emissions during malfunctions are not violations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs.

The EPA believes that 25–4–13 R.I. Code R. § 16.2 is impermissible under the CAA as interpreted in the EPA's SSM Policy, due to an insufficiently bounded director's discretion provision. The provision specifies a mechanism for a variance to be granted "[i]n the event that the malfunction of an air pollution control system is expected or may reasonably be expected to continue for longer than 24 hours." This provision could be read to mean that once a state official has exempted excess emissions during malfunctions from otherwise applicable SIP limitations, those excess emissions are not violations. As discussed in section VII.A of this notice, such director's discretion provisions are impermissible. Such an interpretation would make the state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation, which could preclude enforcement by the EPA or the public who might disagree about whether enforcement action is warranted. Most importantly, however, the provision may be read to authorize the state official to create an exemption from the emission limitation, and such an exemption is impermissible in the first instance. The EPA believes that inclusion of an insufficiently bounded director's discretion provision in 25–4–13 R.I. Code R. § 16.2 is thus a substantial inadequacy and renders this specific SIP provision impermissible for this reason.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to 25–4–13 R.I. Code R. § 16.2. The EPA believes that this provision allows for exemptions from otherwise applicable emission limitations through a state official's unilateral exercise of discretionary authority that is insufficiently bounded. Such provisions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For these reasons, the EPA is proposing to find that this provision is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

C. Affected States in EPA Region II

1. New Jersey

a. Petitioner's Analysis

The Petitioner objected to two specific provisions in the New Jersey SIP that allow for automatic exemptions for excess emissions during emergency situations.[104] The Petitioner objected to the first provision because it provides industrial process units that have the potential to emit sulfur compounds an exemption from the otherwise applicable sulfur emission limitations where "[t]he discharge from any stack or chimney [has] the sole function of relieving pressure of gas, vapor or liquid under abnormal emergency conditions" (N.J. Admin. Code 7:27–7.2(k)(2)). The Petitioner argued that such an exemption is inconsistent with the requirements of the CAA and the EPA's SSM Policy. The Petitioner argued that the CAA and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations.

The Petitioner objected to the second provision because it provides electric generating units (EGUs) an exemption from the otherwise applicable NO_X emission limitations when the unit is operating at "emergency capacity," also known as a "MEG alert," which is statutorily defined as a period in which one or more EGUs is operating at emergency capacity at the direction of the load dispatcher in order to prevent or mitigate voltage reductions or interruptions in electric service, or both (N.J. Admin. Code 7:27–19.1). The Petitioner argued that this source-specific exemption from the emission limitations "cannot ensure compliance with the NAAQS and PSD increments for NO_X because ambient air quality is nowhere mentioned as a relevant consideration."[105]

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations of such limitations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that excess emissions during emergency conditions, however defined, are not violations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs.

The first provision identified by the Petitioner explicitly states that emission limitations of sulfur compounds "shall not apply" to emissions coming from a stack or a chimney during "abnormal emergency conditions," when the discharges are solely to relieve pressure of gas, vapor, or liquid. The EPA believes that inclusion of such an exemption from emission limitations in N.J. Admin. Code 7:27–7.2(k)(2) is a substantial inadequacy and renders this specific SIP provision impermissible. The EPA notes that this exemption is impermissible even though the state has imposed the limitation that such exemption would apply only during "abnormal emergency conditions." The core problem remains that the provision provides an impermissible exemption from the sulfur compound emission limitations otherwise applicable under the SIP.

With regard to the second provision raised by the Petitioner (N.J. Admin. Code 7:27–19.1), the EPA disagrees that it is a substantial inadequacy in the SIP, because the exemption from the NO_X emission limitations ceased to be applicable after November 15, 2005. Because the statute's exemption applies only to those emergency situations, or

[104] Petition at 53–54.

[105] Petition at 54.

"MEG alerts," that occur "on or before November 15, 2005" (N.J. Admin. Code 7:27–19.1), the Petitioner's claim is moot.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to N.J. Admin. Code 7:27–7.2(k)(2). The EPA believes that this provision allows for an exemption from the otherwise applicable emission limitations, and that such an exemption is inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For this reason, the EPA is proposing to find that this provision is substantially inadequate to meet CAA requirements and thus is proposing to issue a SIP call with respect to this provision. The EPA proposes to deny the Petition with respect to N.J. Admin. Code 7:27–19.1, because its effectiveness expired on November 15, 2005, and therefore Petitioner's claim with regard to the impermissibility of this provision is moot.

2. [Reserved]

D. Affected States in EPA Region III

1. Delaware

a. Petitioner's Analysis

The Petitioner objected to seven provisions in the Delaware SIP that provide exemptions during startup and shutdown from the otherwise applicable SIP emission limitations.[106] The seven source-specific and pollutant-specific provisions that provide exemptions during periods of startup and shutdown are: 7–1100–1104 Del. Code Regs § 1.5 (Particulate Emissions from Fuel Burning Equipment); 7–1100–1105 Del. Code Regs § 1.7 (Particulate Emissions from Industrial Process Operations); 7–1100–1108 Del. Code Regs § 1.2 (Sulfur Dioxide Emissions from Fuel Burning Equipment); 7–1100–1109 Del. Code Regs § 1.4 (Emissions of Sulfur Compounds From Industrial Operations); 7–1100–1114 Del. Code Regs § 1.3 (Visible Emissions); 7–1100–1124 Del. Code Regs § 1.4 (Control of Volatile Organic Compound Emissions); and 7–1100–1142 Del. Code Regs § 2.3.5 (Specific Emission Control Requirements). These provisions provide exemptions to the emission limitations during startup and shutdown when "the emissions * * * during start-up and shutdown are governed by an operation permit issued pursuant to the provisions of 2.0 of 7 DE Admin. Code 1102." (*E.g.*, 7–1100–1104 Del. Code Regs § 1.5.)

The Petitioner objected to these provisions because they provide a state official with the discretion, through the permitting process, to exempt sources from otherwise applicable SIP emission limitations or to set alternative limitations for periods of startup and shutdown. The Petitioner argued that such discretion is not permissible because the CAA and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations. Moreover, the Petitioner argued that any alternative limits for periods of startup and shutdown created by the state official through the permitting process do not meet the requirements of the Act and the EPA's SSM Policy, because there is no requirement in the provision that the limits be narrowly tailored, source-specific, created in consultation with the EPA, and approved into the Delaware SIP by the EPA.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup and shutdown could be deemed not a violation of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs.

The EPA believes that the seven provisions raised by the Petitioner are impermissible because they are unbounded director's discretion provisions, created through the state permitting program, in which state officials are provided unbounded discretion to set alternative limits and could therefore provide an outright exemption from the emission limitations. In each of the provisions raised by the Petitioner, an exemption from the SIP's emission limitations during periods of startup and shutdown is automatically granted if the permit to which the source is subject has terms or conditions governing emissions during startup and shutdown. The SIP provisions therefore vest state officials with the unilateral power to establish alternative limits, or to create an exemption altogether, in permits by deeming such periods of excess emissions during startup and shutdown permissible. Were the state to exercise its discretion and decide on a case-by-case basis that such an event was not a violation of the emission limitations, the EPA and citizens could be precluded from enforcement. More importantly, however, an exemption from the emission limitations is impermissible in the first instance, and these provisions purport to authorize state officials in the permitting context to grant such exemptions. These provisions therefore undermine the SIP's emission limitations and the emissions reductions they are intended to achieve and render them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of insufficiently bounded director's discretion provisions in 7–1100–1104 Del. Code Regs § 1.5, 7–1100–1105 Del. Code Regs § 1.7, 7–1100–1108 Del. Code Regs § 1.2, 7–1100–1109 Del. Code Regs § 1.4, 7–1100–1114 Del. Code Regs § 1.3, 7–1100–1124 Del. Code Regs § 1.4, and 7–1100–1142 Del. Code Regs § 2.3.5 is thus a substantial inadequacy and renders these specific SIP provisions impermissible for this reason.

In addition, the EPA agrees with the Petitioner that while the CAA, as interpreted in the EPA's SSM Policy, allows states to set source category-specific alternative emission limitations or other forms of enforceable control measures or techniques that apply during periods of startup and shutdown, such alternative limitations are only permitted in a narrow set of circumstances and must be accomplished through the appropriate SIP process (*see* section VII.A of this notice.) Those alternative limitations must be developed in consultation with the EPA and must be approved by the EPA into the SIP. The provisions of Delaware's SIP raised by the Petitioner purport to authorize the state to establish alternative limitations for excess emissions during periods of startup and shutdown (or to exempt those emissions altogether, as discussed above) on a case-by-case basis in the permitting process, and the provisions do not require the state to consult with the EPA or have those alternative limits approved by the EPA into the SIP. The EPA believes that the inclusion of processes to establish alternative limits for some sources and in regard to some

[106] Petition at 28–29.

pollutants in a manner that does not conform with the requirements of the Act as interpreted in the EPA's SSM Policy in 7–1100–1104 Del. Code Regs § 1.5, 7–1100–1105 Del. Code Regs § 1.7, 7–1100–1108 Del. Code Regs § 1.2, 7–1100–1109 Del. Code Regs § 1.4, 7–1100–1114 Del. Code Regs § 1.3, 7–1100–1124 Del. Code Regs § 1.4, and 7–1100–1142 Del. Code Regs § 2.3.5 is thus a substantial inadequacy and renders these specific SIP provisions impermissible, in addition to the creation of unbounded discretion in a state official.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to 7–1100–1104 Del. Code Regs § 1.5, 7–1100–1105 Del. Code Regs § 1.7, 7–1100–1108 Del. Code Regs § 1.2, 7–1100–1109 Del. Code Regs § 1.4, 7–1100–1114 Del. Code Regs § 1.3, 7–1100–1124 Del. Code Regs § 1.4, and 7–1100–1142 Del. Code Regs § 2.3.5. The EPA believes that these provisions allow for exemptions from otherwise applicable SIP emission limitations, and that such outright exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs in sections 110(a)(2)(A), 110(a)(C), and 302(k). In addition, the aforementioned provisions each allow for such exemptions through a state official's unilateral exercise of insufficiently bounded discretionary authority in the permitting process, and such provisions are inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions. Moreover, the discretion in these provisions also allows state officials to establish alternative emission limitations during periods of startup and shutdown through a process that does not conform to the requirements of the Act or the EPA's SSM Policy with regard to establishing alternative emission limitations. For these reasons, the EPA is proposing to find that these provisions are substantially inadequate to meet CAA requirements and thus is proposing to issue a SIP call with respect to these provisions.

2. District of Columbia

a. Petitioner's Analysis

The Petitioner objected to five provisions in the District of Columbia (D.C.) SIP as being inconsistent with the CAA and the EPA's SSM Policy.[107] The Petitioner first objected to a generally applicable provision in the D.C. SIP that allows for discretionary exemptions during periods of maintenance or malfunction (D.C. Mun. Regs. tit. 20 § 107.3). The provision provides the Mayor with the authority to permit continued operation of a stationary source when air pollution controls are shut down due to maintenance or malfunction. The Petitioner argued that this provision could provide an exemption from the otherwise applicable SIP emission limitations, and such an exemption is impermissible under the CAA because the statute and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations. Moreover, the Petitioner objected to this discretionary exemption because the Mayor's grant of permission to continue to operate during the period of malfunction or maintenance could be interpreted to excuse excess emissions during such time period and could thus be read to preclude enforcement by the EPA or citizens in the event that the Mayor elects not to treat the event as a violation. Thus, in addition to creating an impermissible exemption for the excess emissions, the Petitioner argued, the provision is also inconsistent with the CAA as interpreted in the EPA's SSM Policy because it allows the Mayor to make a unilateral decision that the excess emissions were not a violation and thus purports to bar enforcement for the excess emissions by the EPA and citizens.

Secondly, the Petitioner objected to the alternative limitations on stationary sources for visible emissions during periods of "start-up, cleaning, soot blowing, adjustment of combustion controls, or malfunction," (D.C. Mun. Regs. tit. 20 § 606.1) and, for fuel-burning equipment placed in initial operation before January 1977, alternative limits for visible emissions during startup and shutdown (D.C. Mun. Regs. tit. 20 § 606.2). The Petitioner also objected to the exemption from emission limitations for emergency standby engines (D.C. Mun. Regs. tit. 20 § 805.1(c)(2)). The Petitioner argued that these provisions could provide exemptions or deviations from the otherwise applicable SIP emission limitations, and such exemptions are impermissible under the CAA because the statute and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations. Moreover, the Petitioner argued that the alternative limits do not appear to meet the criteria for a source category-specific rule as permitted under the EPA's SSM Policy interpreting the Act.

Finally, the Petitioner objected to the provision in the D.C. SIP that provides an affirmative defense for violations of visible emission limitations during "unavoidable malfunction" (D.C. Mun. Regs. tit. 20 § 606.4). The Petitioner objected to this provision because the elements of the defense are not laid out clearly in the SIP, because the term "affirmative defense" is not defined in the SIP, and finally, the Petitioner argues, because affirmative defenses for any excess emissions are wholly inconsistent with the CAA and should be removed from the SIP.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, load change, or emergencies are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The EPA believes that the inclusion of such an exemption from the emission limitations in D.C. Mun. Regs. tit. 20 § 107.3 is thus a substantial inadequacy and renders this specific SIP provision impermissible.

The EPA believes that D.C. Mun. Regs. tit. 20 § 107.3 is also impermissible due to an unbounded director's discretion provision that purports to make the Mayor the unilateral arbiter of whether the excess emissions in a given event constitute a violation. In the case of D.C. Mun. Regs. tit. 20 § 107.3, the provision authorizes the Mayor to permit continued operation at stationary sources without functioning air pollution control equipment. The Mayor's grant of permission to continue to operate during the period of malfunction or maintenance could be interpreted to excuse excess emissions from that time period, and it could thus be read to preclude enforcement by the EPA or through a citizen suit in the event that the Mayor elects not to treat the event as a violation. In addition, the provision vests the Mayor with the unilateral power to grant an exemption from the

[107] Petition at 29–30.

otherwise applicable SIP emission limitation, without any additional public process at the D.C. or federal level, and without any bounds or parameters to the exercise of this discretion. Most importantly, however, the provision purports to authorize the Mayor to create an exemption from the emission limitation, and such an exemption is impermissible in the first instance. Such a director's discretion provision undermines the emission limitations and the emissions reductions they are intended to achieve and renders them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of an unbounded director's discretion provision in D.C. Mun. Regs. tit. 20 § 107.3 is thus a substantial inadequacy and renders this specific SIP provision impermissible for this reason, in addition to the creation of an impermissible exemption.

The EPA notes that while the CAA does not allow for exemptions for excess emissions, it does, as discussed in section VII.A of this notice, allow states to develop alternative emission limitations or other forms of enforceable control measures or techniques that apply during startup or shutdown. The EPA believes that emission limitations in SIPs should generally be developed in the first instance to account for the types of normal operation outlined in D.C. Mun. Regs. tit. 20 § 606.1, such as cleaning, soot blowing, and adjustment of combustion controls. The D.C. Mun. Regs. tit. 20 §§ 606.1 and 606.2 do not appear to comply with the CAA's requirements as interpreted in the EPA's SSM Policy. The alternative limitations on stationary sources for visible emissions during periods of "start-up, cleaning, soot blowing, adjustment of combustion controls, or malfunction," (D.C. Mun. Regs. tit. 20 § 606.1) do not comply with the Act and the EPA's policy interpreting the Act, because, for instance, they do not apply only to "specific, narrowly-defined source categories using specific control strategies." [108] The EPA believes that the inclusion of these alternative limitations, which do not comply with the requirements of the Act, in D.C. Mun. Regs. tit. 20 §§ 606.1 and 606.2 is thus a substantial inadequacy and renders these specific SIP provisions impermissible.

With respect to the Petitioner's objection to the exemption for emergency standby engines (D.C. Mun. Regs. tit. 20 § 805.1(c)(2)), the EPA disagrees that this provision applies to an exemption from emission limitations during startup, shutdown, or malfunction periods. Instead, this provision applies to a specific source category that is not subject to control under the D.C. SIP. At this point in time, the SIP reflects that regulation of this source category is not necessary in the SIP in order to meet the applicable reasonably available control technology (RACT) requirements or other CAA requirements in this area. The EPA therefore disagrees with Petitioner that D.C. Mun. Regs. tit. 20 § 805.1(c)(2) renders the D.C. SIP substantially inadequate.

Finally, the EPA agrees with the Petitioner that the affirmative defense contained in D.C. Mun. Regs. tit. 20 § 606.4 is not an acceptable affirmative defense provision under the CAA as interpreted the EPA's SSM Policy. Although the EPA believes that narrowly drawn affirmative defenses are permitted under the CAA for malfunction events (*see* section VII.B of this notice), the EPA's interpretation of the CAA is that such affirmative defenses can only shield the source from monetary penalties and cannot be a bar to injunctive relief. An affirmative defense provision that purports to bar any enforcement action for injunctive relief for violations of emission limitations is inconsistent with the requirements of CAA sections 113 and 304. Furthermore, the SIP provision is deficient because while it appears to create an affirmative defense, it does so with conditions that are not consistent with the criteria that the EPA recommends in the SSM Policy. The EPA acknowledges that the SSM Policy is only guidance concerning what types of SIP provisions could be consistent with the requirements of the CAA. Nonetheless, through this rulemaking, the EPA is proposing to determine that D.C. Mun. Regs. tit. 20 § 606.4 does not include criteria that are sufficiently robust to qualify as an acceptable affirmative defense provision. The EPA believes that the inclusion of the complete bar to liability, including injunctive relief, and the insufficiently robust qualifying criteria in D.C. Mun. Regs. tit. 20 § 606.4 are substantial inadequacies and render this specific SIP provision impermissible.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to D.C. Mun. Regs. tit. 20 § 107.3. The EPA believes that this provision allows for exemptions from the otherwise applicable SIP emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs in sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, D.C. Mun. Regs. tit. 20 § 107.3 allows for such an exemption through a state official's unilateral exercise of discretionary authority that is unbounded and includes no additional public process at the D.C. or federal level, and such provisions are inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions. For these reasons, the EPA is proposing to find that D.C. Mun. Regs. tit. 20 § 107.3 is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

The EPA also proposes to grant the Petition with respect to D.C. Mun. Regs. tit. 20 §§ 606.1 and 606.2. The EPA believes that section 606.1 impermissibly provides an alternative visible emission limitation to stationary sources during periods of malfunction and during planned maintenance events. Furthermore, while sections 606.1 and 606.2 appropriately provide alternative visible emission limitations only during periods of startup and shutdown, both sections apply to a broad category of sources and are not narrowly limited to a source category employing a specific control strategy, as required by the CAA as interpreted in the EPA's SSM Policy. For these reasons, the EPA is proposing to find that D.C. Mun. Regs. tit. 20 §§ 606.1 and 606.2 are substantially inadequate to meet CAA requirements and is thus proposing to issue a SIP call with respect to these provisions.

The EPA proposes to deny the Petition with respect to D.C. Mun. Regs. tit. 20 § 805.1(c)(2). The EPA disagrees that this provision applies to an exemption from emission limitations during startup, shutdown, or malfunction periods. Rather, this provision applies to a specific source category that is not subject to control under the D.C. SIP. At this point in time, the SIP reflects that regulation of this source category is not necessary in the SIP in order to meet the applicable RACT requirements or other CAA requirements in this area.

Finally, the EPA proposes to grant the petition with respect to D.C. Mun. Regs. tit. 20 § 606.4 because it is not a permissible affirmative defense provision consistent with the requirements of the CAA and the EPA's recommendations in the EPA's SSM Policy. By purporting to create a bar to enforcement that applies not just to monetary penalties but also to injunctive relief, this provision is inconsistent with the requirements of

[108] 1999 SSM Guidance Attachment at 4–5.

CAA sections 113 and 304. By not including sufficient criteria to assure that sources seeking to raise the affirmative defense have in fact been properly designed, maintained, and operated, and to assure that sources have taken all appropriate steps to minimize excess emissions, the provision also fails to be sufficiently narrowly drawn to justify shielding from monetary penalties for violations. Thus, this provision is not appropriate as an affirmative defense provision because it is inconsistent with fundamental requirements of the CAA. For these reasons, the EPA is proposing to find that this provision is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

3. Virginia

a. Petitioner's Analysis

The Petitioner objected to a generally applicable provision in the Virginia SIP that allows for discretionary exemptions during periods of malfunction (9 Va. Admin. Code § 5–20–180(G)).[109] First, the Petitioner objected because this provision provides an exemption from the otherwise applicable SIP emission limitations, and such an exemption is impermissible under the CAA because the statute and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations. The Petitioner argued that the CAA and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations.

Second, the Petitioner objected to the discretionary exemption for excess emissions during malfunction because the provision gives the state the authority to determine whether a violation "shall be judged to have taken place" (9 Va. Admin. Code § 5–20–180(G)). The Petitioner argued that this provision could be read to preclude enforcement by the EPA or citizens in the event that the state elects not to treat the event as a violation. Thus, in addition to creating an impermissible exemption for the excess emissions, the Petitioner argued, the provision is also inconsistent with the CAA and the EPA's SSM Policy because it allows the state to make a unilateral decision that the excess emissions were not a violation and thus purports to bar enforcement for the excess emissions by the EPA and citizens.

Third, the Petitioner argued that while the regulation provides criteria, akin to an affirmative defense, by which the state must make such a judgment that the event is not a violation, the criteria "fall far short of EPA policy" and the provision "fails to establish any procedure through which the criteria are to be evaluated."

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions such as 9 Va. Admin. Code § 5–20–180(G) that create exemptions by authorizing the state to determine that the excess emissions during startup, shutdown, load change, or emergencies are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The EPA believes that the inclusion of such an exemption in 9 Va. Admin. Code § 5–20–180(G) is thus a substantial inadequacy and renders this specific SIP provision impermissible.

The EPA believes that 9 Va. Admin. Code § 5–20–180(G) is also impermissible due to the inclusion of a director's discretion provision that purports to make the state official the unilateral arbiter of whether the excess emissions in a given malfunction event constitute a violation. In the case of 9 Va. Admin. Code § 5–20–180(G), the provision authorizes the state official to judge that "no violation" has taken place. The provision therefore vests the state official with the unilateral power to grant an exemption from the otherwise applicable SIP emission limitation, without any additional public process at the state or federal level. By deciding that an exceedance of the emission limitation was not a "violation," exercise of this discretion could preclude enforcement by the EPA or the public who may not agree with that conclusion. Most importantly, however, the provision purports to authorize the state official to create an exemption from the otherwise applicable SIP emission limitation, and such an exemption is impermissible in the first instance. Such a director's discretion provision undermines the emission limitations in the SIP and the emissions reductions that they are intended to achieve and renders them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of a director's discretion provision in 9 Va. Admin. Code § 5–20–180(G) is thus a substantial inadequacy and renders this specific SIP provision impermissible for this reason, in addition to the creation of an impermissible exemption.

Finally, the EPA agrees with Petitioner that although the exemption requires that certain conditions must be met by the source, the conditions set forth in the provision do not render it an acceptable affirmative defense provision. The Petitioner is correct that 9 Va. Admin. Code § 5–20–180(G) is not an acceptable affirmative defense provision under the CAA as interpreted in the EPA's SSM Policy. Although the EPA believes that narrowly drawn affirmative defenses are permitted under the CAA for malfunction events (*see* section VII.B of this notice), the EPA's interpretation of the CAA is that such affirmative defenses can only shield the source from monetary penalties and cannot be a bar to injunctive relief. An affirmative defense provision that purports to bar any enforcement action for injunctive relief for violations of emission limitations is inconsistent with the requirements of CAA sections 113 and 304. Furthermore, Virginia's SIP provision is deficient because even if it attempts to create an affirmative defense rather than an automatic exemption from the emission limitations, it does so with conditions that are not consistent with the criteria that the EPA recommends in the SSM Policy. The EPA acknowledges that the SSM Policy is only guidance concerning what types of SIP provisions could be consistent with the requirements of the CAA. Nonetheless, through this rulemaking, the EPA is proposing to determine that 9 Va. Admin. Code § 5–20–180(G) does not include criteria that are sufficiently robust to qualify as an acceptable affirmative defense provision under the CAA. The EPA believes that the inclusion of the complete bar to liability, including injunctive relief, and the insufficiently robust qualifying criteria in 9 Va. Admin. Code § 5–20–180(G) are substantial inadequacies and render this specific SIP provision impermissible.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to 9 Va. Admin. Code § 5–20–180(G). The EPA believes

[109] Petition at 70–71.

that this provision allows for an exemption from the otherwise applicable SIP emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs in sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, 9 Va. Admin. Code § 5–20–180(G) allows for such an exemption through a state official's unilateral exercise of discretionary authority that includes no additional public process at the state or federal level, and such provisions are inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions.

Moreover, even if the EPA were to consider 9 Va. Admin. Code § 5–20–180(G) as providing for an affirmative defense rather than an automatic exemption, the provision is not a permissible affirmative defense provision consistent with the requirements of the CAA as interpreted in the EPA's recommendations in the EPA's SSM Policy. By purporting to create a bar to enforcement that applies not just to monetary penalties but also to injunctive relief, this provision is inconsistent with the requirements of CAA sections 113 and 304. By not including sufficient criteria to assure that sources seeking to raise the affirmative defense have in fact been properly designed, maintained, and operated, and to ensure that sources have taken all appropriate steps to minimize excess emissions, the provision also fails to be sufficiently narrowly drawn to justify shielding from monetary penalties for violations. Thus, this provision is not appropriate as an affirmative defense provision because it is inconsistent with fundamental requirements of the CAA.

For these reasons, the EPA is proposing to find that this provision is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

4. West Virginia

a. Petitioner's Analysis

The Petitioner made four types of objections identifying inadequacies regarding startup, shutdown, and malfunction provisions in West Virginia's SIP.[110] First, the Petitioner objected to three specific provisions in the West Virginia SIP that allow for automatic exemptions from emission limitations, standards, and monitoring and recordkeeping requirements for excess emission during startup, shutdown, or malfunction (W. Va. Code R. § 45–2–9.1, W. Va. Code R. § 45–7–10.3, and W. Va. Code R. § 45–40–100.8). The Petitioner objected because all three of these provisions provide exemptions from the otherwise applicable SIP emission limitations, and such exemptions are inconsistent with the requirements of the CAA as interpreted in the EPA's SSM Policy. The Petitioner argued that the CAA and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations. The Petitioner also objected to all three of these provisions because, by providing an outright exemption from otherwise applicable requirements, the state has defined these excess emissions as not violations, thereby precluding enforcement by the EPA or citizens for the excess emissions that would otherwise be violations.

Second, the Petitioner objected to seven discretionary exemption provisions because these provisions provide exemptions from the otherwise applicable SIP emission limitations, and such exemptions are impermissible under the CAA because the statute and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations. The Petitioner noted that the provisions allow a state official to "grant an exception to the otherwise applicable visible emissions standards" due to "unavoidable shortage of fuel" or "any emergency situation or condition creating a threat to public safety or welfare" (W. Va. Code R. § 45–2–10.1), to permit excess emissions "due to unavoidable malfunctions of equipment" (W. Va. Code R. § 45–3–7.1, W. Va. Code R. § 45–5–13.1, W. Va. Code R. § 45–6–8.2, W. Va. Code R. § 45–7–9.1, and W. Va. Code R. § 45–10–9.1), and to permit exceedances where the limit cannot be "satisfied" because of "routine maintenance" or "unavoidable malfunction" (W. Va. Code R. § 45–21–9.3). The Petitioner argued that these provisions could be read to preclude enforcement by the EPA or citizens in the event that the state official elects not to treat the event as a violation. Thus, in addition to creating an impermissible exemption for the excess emissions, the Petitioner argued, the SIP's provisions are also inconsistent with the CAA as interpreted in the EPA's SSM Policy because they allow the state official to make a unilateral decision that the excess emissions were not a violation and thus purport to bar enforcement for the excess emissions by the EPA and citizens.

Third, the Petitioner objected to the alternative limit imposed on hot mix asphalt plants during periods of startup and shutdown in W. Va. Code R. § 45–3–3.2 because it was "not sufficiently justified" under the requirements of source category-specific rules. The Petitioner argued that this provision could provide an unacceptable deviation during periods of startup and shutdown from the otherwise applicable SIP emission limitations, and such deviations are impermissible under the CAA because the statute and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations. Moreover, the Petitioner argued that the alternative limits do not appear to meet the criteria for a source category-specific rule as permitted under the Act as interpreted in the EPA's SSM Policy.

Fourth, the Petitioner objected to a discretionary provision allowing the state to approve an alternative visible emission standard during startups and shutdowns for manufacturing processes and associated operations (W. Va. Code R. § 45–7–10.4). The Petitioner argued that such a provision "allows a decision of the state to preclude enforcement by EPA and citizens."

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for automatic exemptions from otherwise applicable SIP emission limitations. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations of such limitations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, or malfunction are not violations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. Two of the automatic exemption provisions identified by the Petitioner explicitly state that the standards shall not apply or that certain operations "shall be exempt" during periods of startup, shutdown, malfunction, or maintenance (W. Va. Code R. § 45–2–9.1, W. Va. Code R. § 45–7–10.3). The third automatic exemption states that requirements for monitoring, recordkeeping, and reporting will not apply under certain circumstances (W. Va. Code R. § 45–40–100.8). Such an

[110] Petition at 72–74.

exemption would affect the enforceability of the emission limitations and thus adversely affects the approvability of the emission limitations themselves. Moreover, failure to account accurately for excess emissions at sources during SSM events has a broader impact on NAAQS implementation and SIP planning, because such accounting directly informs the development of emissions inventories and emissions modeling. The exemptions therefore provide that the resulting excess emissions will not be violations, which is contrary to the requirements of the CAA. The EPA believes that the inclusion of such automatic exemptions from emission limitations in W. Va. Code R. § 45–2–9.1, W. Va. Code R. § 45–7–10.3, and W. Va. Code R. § 45–40–100.8, is thus a substantial inadequacy and renders these specific SIP provisions impermissible.

With respect to the Petitioner's concern that these exemptions preclude enforcement by the EPA or citizens, the EPA agrees that this is one of the critical reasons why such provisions are impermissible under the CAA. By having SIP provisions that define what would otherwise be violations of the applicable emission limitations as non-violations, the state has effectively negated the ability of the EPA or the public to enforce against those violations.

The EPA also agrees that the CAA does not allow for discretionary exemptions from otherwise applicable SIP emission limitations. As noted above, in accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions such as W. Va. Code R. § 45–2–10.1, W. Va. Code R. § 45–3–7.1, W. Va. Code R. § 45–5–13.1, W. Va. Code R. § 45–6–8.2, W. Va. Code R. § 45–7–9.1, W. Va. Code R. § 45–10–9.1, and W. Va. Code R. § 45–21–9.3 that create exemptions by permitting the state to determine that the excess emissions during startup, shutdown, load change, or emergencies are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The EPA believes that the inclusion of these discretionary exemptions in the SIP is thus a substantial inadequacy and renders these specific SIP provisions impermissible.

The EPA believes that W. Va. Code R. § 45–2–10.1, W. Va. Code R. § 45–3–7.1, W. Va. Code R. § 45–5–13.1, W. Va. Code R. § 45–6–8.2, W. Va. Code R. § 45–7–9.1, W. Va. Code R. § 45–10–9.1, and W. Va. Code R. § 45–21–9.3 are also impermissible because these provisions purport to make a state official the unilateral arbiter of whether the excess emissions in a given malfunction, maintenance, or emergency event constitute a violation. In the case of W. Va. Code R. § 45–2–10.1, the provision allows the state official to "grant an exception to the otherwise applicable visible emissions standards" due to "unavoidable shortage of fuel" or "any emergency situation or condition creating a threat to public safety or welfare." W. Va. Code R. § 45–3–7.1, W. Va. Code R. § 45–5–13.1, W. Va. Code R. § 45–6–8.2, W. Va. Code R. § 45–7–9.1, and W. Va. Code R. § 45–10–9.1 permit excess emissions "due to unavoidable malfunctions of equipment." The provision at W. Va. Code R. § 45–21–9.3 permits exceedances where the limit cannot be "satisfied" because of "routine maintenance" or "unavoidable malfunction."

These provisions authorize the state official to judge that violations have not occurred even though the emissions exceeded the applicable SIP emission limitations. The SIP's provisions therefore vest the state official with the unilateral power to grant exemptions from otherwise applicable SIP emission limitations, without any additional public process at the state or federal level. By deciding that an exceedance of the emission limitation was not a "violation," exercise of this discretion could preclude enforcement by the EPA or through a citizen suit. Most importantly, however, the provision purports to authorize the state official to create an exemption from the otherwise applicable SIP emission limitation, and such an exemption is impermissible in the first instance. Such a director's discretion provision undermines the emission limitations and the emissions reductions they are intended to achieve and renders them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of director's discretion provisions in W. Va. Code R. § 45–2–10.1, W. Va. Code R. § 45–3–7.1, W. Va. Code R. § 45–5–13.1, W. Va. Code R. § 45–6–8.2, W. Va. Code R. § 45–7–9.1, W. Va. Code R. § 45–10–9.1, and W. Va. Code R. § 45–21–9.3 is thus a substantial inadequacy and renders these specific SIP provisions impermissible for this reason, in addition to the creation of an impermissible exemption.

The EPA notes that while the CAA does not allow for exemptions for excess emissions, it does, as discussed in section VII.A of this notice, permit states to develop alternative emission limitations or other forms of enforceable control measures or techniques that apply during startup or shutdown. W. Va. Code R. § 45–3–3.2 and W. Va. Code R. § 45–2–10.2 [111] do not appear to comply with the Act's requirements as interpreted in the EPA's SSM Policy. The alternative smoke and/or particulate matter limitation on hot mix asphalt plants that applies during periods of startup and shutdown (W. Va. Code R. § 45–3–3.2) does not comply with the CAA as interpreted in the EPA's policy because, for instance, it does not apply only to "specific, narrowly-defined source categories using specific control strategies." [112] W. Va. Code R. § 45–2–10.2, which allows fuel-burning units employing flue gas desulphurization systems to bypass such systems during "necessary planned or unplanned maintenance" and provides an alternative limit of 20-percent opacity during such periods, also does not comply with the CAA as interpreted in the EPA's SSM Policy. The EPA believes that such special emission limitations or emissions controls may be appropriate during startup or shutdown, but other modes of normal source operation, including maintenance, should be accounted for in the development of the emission limitations themselves. The EPA believes that the inclusion of alternative limits that do not meet the requirements of the CAA as interpreted in the EPA's SSM Policy in W. Va. Code R. § 45–3–3.2 and W. Va. Code R. § 45–2–10.2 is thus a substantial inadequacy and renders these specific SIP provisions impermissible for this reason.

The EPA also agrees that the discretionary provision allowing a state official to approve an alternative visible emission standard during startups and shutdowns for manufacturing processes and associated operations (W. Va. Code R. § 45–7–10.4) does not comply with the CAA or the EPA's SSM Policy interpreting the CAA. These provisions purport to authorize the state official to establish alternative limits for excess emissions during periods of startup and shutdown (or, potentially, to exempt

[111] The EPA notes that the Petitioner specifically focused on concern with W. Va. Code R. § 45–2–10.1, but the same issue affects W. Va. Code R. § 45–2–10.2.

[112] 1999 SSM Guidance Attachment at 4–5.

those emissions altogether) on a case-by-case basis, and these provisions do not require the state official to consult with the EPA or to have those alternative limits approved by the EPA into the SIP, contrary to the EPA's SSM Policy interpreting the requirements of the CAA. The EPA believes that the inclusion of these alternative limitations, which do not comply with the EPA's interpretations of the requirements of the CAA, in W. Va. Code R. § 45–3–3.2 and W. Va. Code R. § 45–7–10.4, is thus a substantial inadequacy and renders these specific SIP provisions impermissible.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to W. Va. Code R. § 45–2–9.1, W. Va. Code R. § 45–7–10.3, and W. Va. Code R. § 45–40–100.8. The EPA believes that each of these provisions allows for automatic exemptions from the otherwise applicable SIP emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, by creating these impermissible exemptions, the state has defined violations in way that would interfere with effective enforcement by the EPA and citizens for excess emissions during these events as provided in CAA sections 113 and 304. For these reasons, the EPA is proposing to find that these provisions are substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to these provisions.

The EPA proposes to grant the Petition with respect to W. Va. Code R. § 45–2–10.1, W. Va. Code R. § 45–3–7.1, W. Va. Code R. § 45–5–13.1, W. Va. Code R. § 45–6–8.2, W. Va. Code R. § 45–7–9.1, W. Va. Code R. § 45–10–9.1, and W. Va. Code R. § 45–21–9.3. The EPA believes that these provisions allow for discretionary exemptions from otherwise applicable SIP emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, these provisions allow for exemptions through a state official's unilateral exercise of discretionary authority that includes no additional public process at the state or federal level, and such provisions are inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions.

The EPA also proposes to grant the Petition with respect to W. Va. Code R. § 45–3–3.2, W. Va. Code R. § 45–2–10.2, and W. Va. Code R. § 45–7–10.4. The W. Va. Code R. § 45–3–3.2 applies to a broad category of sources and is not narrowly limited to a source category that uses a specific control strategy, as required by the EPA's SSM Policy interpreting the CAA. Similarly, W. Va. Code R. § 45–2–10.2 is inconsistent with the EPA's SSM Policy interpreting the CAA because it is an alternative limit that applies during periods of maintenance, and such alternative limits are only permissible during periods of startup and shutdown. The W. Va. Code R. § 45–7–10.4 allows state officials the discretion to establish alternative visible emissions standards during startup and shutdown upon application. This provision is inconsistent with the EPA's SSM Policy and requirements under the Act because, for example, the emission limitations are required to be developed in consultation with the EPA and must be included in the SIP itself. For these reasons, the EPA is proposing to find that W. Va. Code R. § 45–3–3.2, W. Va. Code R. § 45–2–10.2, and W. Va. Code R. § 45–7–10.4 are substantially inadequate to meet CAA requirements and is thus proposing to issue a SIP call with respect to these provisions.

E. Affected States and Local Jurisdictions in EPA Region IV

1. Alabama

a. Petitioner's Analysis

The Petitioner objected to two generally applicable provisions in the Alabama SIP that allow for discretionary exemptions during startup, shutdown, or load change (Ala Admin Code Rule 335–3–14–.03(1)(h)(1)), and during emergencies (Ala Admin Code Rule 335–3–14–.03(1)(h)(2)).[113] [114] First, the Petitioner objected because both of these provisions provide exemptions from the otherwise applicable emission limitations, and such exemptions are inconsistent with the requirements of the CAA and the EPA's SSM Policy. The Petitioner argued that the CAA and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations.

Second, the Petitioner objected to the discretionary exemptions for excess emissions during startup, shutdown, or load change that are also present in Ala Admin Code Rule 335–3–14–.03(1)(h)(1) because the emissions during such events can be reasonably avoided. The Petitioner noted that such events are part of normal source operation and that any special treatment of excess emissions during such events must be justified with a showing that the excess emissions could not be avoided through careful planning and design, and that bypassing controls in such events is necessary to prevent loss of life, personal injury, or severe property damage.

Third, the Petitioner objected to the discretionary emergency exemption provision that also is present in Ala Admin Code Rule 335–3–14–.03(1)(h)(2), because the provision gives the state "sole authority to determine whether or not a violation has occurred." The Petitioner argued that this provision could be read to preclude enforcement by the EPA or citizens in the event that the state elects not to treat the event as a violation. Thus, in addition to creating an impermissible exemption for the excess emissions, the Petitioner argued that the provision is also inconsistent with the CAA and the EPA's SSM Policy because it allows the state to make a unilateral decision that the excess emissions were not a violation and thus purports to bar enforcement for the excess emissions by the EPA and citizens.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitations must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, load change, or emergencies are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The EPA believes

[113] Petition at 17–18.

[114] The EPA notes that the Petitioner also identified several additional pollutant-specific and source category-specific provisions in the Alabama SIP that it alleged are inconsistent with the CAA and the EPA's SSM Policy. However, the Petitioner did not request that the EPA address those SIP provisions in its remedy request, and thus the EPA is not addressing those provisions in this action. The EPA may elect to evaluate those provisions in a later action.

that the inclusion of such exemptions from the emission limitations in Ala Admin Code Rule 335–3–14–.03(1)(h)(1) and Ala Admin Code Rule 335–3–14–.03(1)(h)(2) is thus a substantial inadequacy and renders these specific SIP provisions impermissible.

In addition, the EPA agrees that startup, shutdown, and load change are all part of normal source operation and that such events are usually planned for and predictable, and thus emissions during such events are more controllable than those that might occur during an "emergency" or other form of malfunction. Unlike excess emissions in malfunctions, which are by definition presumed to be beyond the reasonable control of the source through proper design, operation, and maintenance, excess emissions that occur during startup, shutdown, or load change can be anticipated and steps can be taken to minimize them. The Petitioner, citing the 1983 SSM Guidance, argued that the EPA's SSM Policy indicates that there should be "a higher showing to escape enforcement" during such planned events. While such a higher showing may be relevant in the context of whether a state elects to exercise its enforcement discretion, it should not be germane to whether or not the excess emissions constitute a violation of the applicable emission limitations. The EPA notes that the CAA does not allow exemptions for excess emissions during startup, shutdown, or load change, just as it does not allow such exemptions during malfunctions. As discussed in section VII.A of this notice, states may elect to develop alternative emission limitations or other forms of enforceable control measures or techniques that apply during startup and shutdown, but exemptions for excess emissions during such periods are inconsistent with the fundamental requirements of the CAA.

Finally, the EPA believes that both Ala Admin Code Rule 335–3–14–.03(1)(h)(1) and Ala Admin Code Rule 335–3–14–.03(1)(h)(2) are also impermissible as unbounded director's discretion provisions that make a state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation. In the case of Ala Admin Code Rule 335–3–14–.03(1)(h)(1), the provision authorizes a state official unilaterally to "[], in the Air Permit, exempt on a case by case basis any exceedances of emission limits which cannot reasonably be avoided, such as during periods of start-up, shut-down or load change." This provision vests the state official with the unilateral power to grant in a state air permit, which may not provide any additional public process at the state or federal level, an exemption from the otherwise applicable emission limitations without any bounds or parameters to the exercise of this discretion. By deciding that an exceedance of the emission limitation will not be a "violation," exercise of this discretion could preclude enforcement by the EPA or the public who may not agree that the emissions in question could not "reasonably be avoided." Most importantly, however, the provision authorizes the state official to create an exemption from the emission limitations, and such an exemption is impermissible in the first instance. Such a director's discretion provision undermines the SIP emission limitations and the emissions reductions they are intended to achieve and renders them less enforceable by the EPA or through a citizen suit. As discussed in section VII.A of this notice, such provisions are substantially inadequate to meet CAA requirements.

Similarly, the EPA believes that Ala Admin Code Rule 335–3–14–.03(1)(h)(2) authorizes a state official unilaterally to decide that a given event was an "emergency" and thus to create an exemption from the otherwise applicable emission limitations. In this case, the provision does contain some general parameters for the source to establish that there was an emergency (*e.g.*, the source has to "identify" the cause of the emergency) but nevertheless empowers the state official to make a unilateral determination as to whether the event was an emergency. The provision thus vests the official with the power to grant an exemption from the otherwise applicable SIP emission limitations without any additional public process at the state or federal level, and with insufficient bounds or parameters applicable to the exercise of this discretion. Again, most significantly, this discretion authorizes the creation of an exemption on a case-by-case basis that is not permissible in the first instance. Thus, this provision also may undermine the SIP emission limitations, and the emissions reductions they are intended to achieve, and renders them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of an insufficiently bounded director's discretion provision in Ala Admin Code Rule 335–3–14–.03(1)(h)(1) and Ala Admin Code Rule 335–3–14–.03(1)(h)(2) is thus a substantial inadequacy and renders these specific SIP provisions impermissible for this reason, in addition to the creation of impermissible exemptions.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Ala Admin Code Rule 335–3–14–.03(1)(h)(1) and Ala Admin Code Rule 335–3–14–.03(1)(h)(2). The EPA believes that both of these provisions allow for exemptions from the otherwise applicable emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, Ala Admin Code Rule 335–3–14–.03(1)(h)(1) and Ala Admin Code Rule 335–3–14–.03(1)(h)(2) both allow for such exemptions through a state official's unilateral exercise of discretionary authority that is insufficiently bounded and includes no additional public process at the state or federal level, and such provisions are inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions. Moreover, the discretion created by these provisions allows case-by-case exemptions from emission limitations, when such exemptions are not permissible in the first instance. For these reasons, the EPA is proposing to find that Ala Admin Code Rule 335–3–14–.03(1)(h)(1) and Ala Admin Code Rule 335–3–14–.03(1)(h)(2) are substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to these provisions.

2. Florida

a. Petitioner's Analysis

The Petitioner objected to three specific provisions in the Florida SIP that allow for generally applicable automatic exemptions for excess emissions during startup, shutdown, or malfunction (Fla. Admin. Code Ann Rule 62–201.700(1)), for fossil fuel steam generators during startup and shutdown (Fla. Admin. Code Ann Rule 62–201.700(2)), and for such sources during boiler cleaning and load change (Fla. Admin. Code Ann Rule 62–201.700(3)).[115] [116] The Petitioner objected because all three of these provisions provide exemptions from the otherwise applicable SIP emission limitations, and such exemptions are

[115] Petition at 30–31.

[116] The EPA notes that the Petitioner also identified several additional pollutant-specific and source category-specific provisions in the Florida SIP that it alleged are inconsistent with the CAA and the EPA's SSM Policy. However, the Petitioner did not request that the EPA address those SIP provisions in its remedy request, and thus the EPA is not addressing those provisions in this action. The EPA may elect to evaluate those provisions in a later action.

inconsistent with the requirements of the CAA and the EPA's SSM Policy. The Petitioner argued that the CAA and the EPA's interpretation of the CAA in the SSM Policy require that all excess emissions be treated as violations.

The Petitioner objected to all three of these provisions because, by stating that the excess emissions during the relevant events and time periods "are permitted," the state has defined these excess emissions as not violations, thereby precluding enforcement by the EPA or citizens for the excess emissions that would otherwise be violations. The Petitioner also argued that the provision creating exemptions for excess emissions during boiler cleaning and load change in Fla. Admin. Code Ann Rule 62–201.700(3) is impermissible specifically because it creates an exemption for excess emissions during normal source operation that "are not eligible for any relief under EPA guidance."

After objecting to the three provisions that create the exemptions, the Petitioner noted that the related provision in Fla. Admin. Code Ann Rule 62–201.700(4) reduces the potential scope of the exemptions in the other three provisions if the excess emissions at issue are caused entirely or in part by things such as poor maintenance but that it does not eliminate the impermissible exemptions. Moreover, the Petitioner asserted that none of the four provisions provides any "procedure by which the factual premises of any of these subsections are to be proven."

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable emission limitations. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable SIP emission limitations must be considered violations of such limitations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, malfunction, boiler cleaning, or load change are not violations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The three provisions identified by the Petitioner explicitly state that the excess emissions "shall be permitted" under certain circumstances and thus provide that the resulting excess emissions will not be violations contrary to the CAA, as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). The EPA believes that the inclusion of such exemptions from emission limitations in Fla. Admin. Code Ann Rule 62–201.700(1), Fla. Admin. Code Ann Rule 62–201.700(2) and Fla. Admin. Code Ann Rule 62–201.700(3), is thus a substantial inadequacy and renders these specific SIP provisions impermissible.

The EPA notes that these exemptions are impermissible even though the state has imposed some factual and temporal limitations on their potential scope. For example, in Fla. Admin. Code Ann Rule 62–201.700(1), the state has specified that the excess emissions from startup, shutdown, and malfunction events "shall be permitted" (*i.e.*, allowed and thus not treated as violations) provided: "(1) best operational practices to minimize emissions are adhered to and (2) the duration of excess emissions shall be minimized but in no case exceed two hours in any 24 hour period unless specifically authorized by the Department for longer duration." Similarly, in Fla. Admin. Code Ann Rule 62–201.700(2) with respect to startup and shutdown from certain sources, the state has conditioned the exemption "provided that best operational practices to minimize emissions are adhered to and the duration of excess emissions shall be minimized." In Fla. Admin. Code Ann Rule 62–201.700(3), the state has imposed much more specific limits on the duration of the events and some additional limitations on the excess emissions in the form of specified opacity limits that apply during such events. Although these extra limitations on the scope of the exemptions are helpful features, they nevertheless constitute a variance at a state official's discretion from the otherwise applicable emissions limitations, and the core problem remains that each of the three provisions provides impermissible exemptions from the emission limitations by defining the excess emissions as "permitted" and thus not violations. The CAA does, as discussed in section VII.A of this notice, allow states to develop alternative emission limitations or other forms of enforceable control measures or techniques that apply during startup or shutdown. However, the Florida SIP provisions do not appear to comply with the Act's requirements as interpreted in the EPA's SSM Policy because, for instance, they do not apply only to "specific, narrowly-defined source categories using specific control strategies." [117]

With respect to the Petitioner's concern that these exemptions preclude enforcement by the EPA or citizens, the EPA agrees that this is one of the critical reasons why such provisions are impermissible under the CAA. By having SIP provisions that define what would otherwise be violations of the applicable emission limitations as non-violations, the state has effectively negated the ability of the EPA or the public to enforce against those violations.

In addition, the EPA agrees that the limiting provision of Fla. Admin. Code Ann Rule 62–201.700(4) that curtails the exemptions in the prior provisions if the excess emissions are caused "entirely or in part" by factors within the source's control such as "poor maintenance" does not negate the underlying problem of providing exemptions for the excess emissions in the first instance. The EPA acknowledges that this provision would serve to prevent sources that fail to maintain or operate correctly or otherwise to take action reasonably to prevent excess emissions during SSM events from getting the benefits of the exemption. However, the EPA recommends that these are the types of considerations that should be relevant either in the state's exercise of enforcement discretion for violations, in the state's adoption of a SIP provision concerning that exercise of enforcement discretion by the state, or by an appropriately drawn affirmative defense SIP provision for excess emissions in the case of malfunctions.

Finally, the Petitioner expressed concern that the four SIP provisions at issue "do not specify the procedure by which the factual premises are to be proven." Were these provisions authorizing a state official to make discretionary decisions as to whether or not a given event qualified for the (impermissible) exemption, there could be an additional concern that these provisions included a director's discretion problem as well. However, the EPA believes that these regulations are directly enforceable by the state, the EPA, or members of the public in the appropriate forums, and thus the "procedure" for proving the violation would be the normal process in such forums. The fact that the state has established factual requirements that would need to be evaluated in order to prove a violation of the applicable emission limitations is not itself inconsistent with CAA requirements. The EPA believes that providing

[117] 1999 SSM Guidance Attachment at 4–5.

requisite factual evidence to establish a violation in an enforcement proceeding is entirely appropriate.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Fla. Admin. Code Ann Rule 62–201.700(1), Fla. Admin. Code Ann Rule 62–201.700(2), Fla. Admin. Code Ann Rule 62–201.700(3), and Fla. Admin. Code Ann Rule 62–201.700(4). The EPA believes that each of these provisions allows for exemptions from the otherwise applicable emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, by creating these impermissible exemptions, the state has defined violations in way that would interfere with effective enforcement by the EPA and citizens for excess emissions during these events as provided in CAA sections 113 and 304. For these reasons, the EPA is proposing to find that these provisions are substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to Fla. Admin. Code Ann Rule 62–201.700(1), Fla. Admin. Code Ann Rule 62–201.700(2), Fla. Admin. Code Ann Rule 62–201.700(3), and Fla. Admin. Code Ann Rule 62–201.700(4).

3. Georgia

a. Petitioner's Analysis

The Petitioner objected to a provision in the Georgia SIP that provides for exemptions for excess emissions during startup, shutdown, or malfunctions under certain circumstances (Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7)).[118] The Petitioner acknowledged that this provision of the Georgia SIP includes some conditions for when sources may be entitled to seek the exemption under state law, such as when the source has used "best operational practices" to minimize emissions during the SSM event.

First, the Petitioner objected because the provision creates an exemption from the applicable emission limitations by providing that the excess emissions "shall be allowed" subject to certain conditions, whereas the CAA and the EPA's interpretation of the CAA in the SSM Policy prohibit any such exemptions. The Petitioner noted that all excess emissions are required to be treated as violations of the applicable emission limitations, even if they would qualify for some other special consideration through other means such as enforcement discretion.

Second, the Petitioner argued that although the provision provides some "substantive criteria," the provision does not meet the criteria the EPA recommends for an affirmative defense provision consistent with the requirements of the CAA in the EPA's SSM Policy. Third, the Petitioner asserted that the provision is not a permissible "enforcement discretion" provision applicable only to state personnel, because it "is susceptible to interpretation as an enforcement exemption, precluding EPA and citizen enforcement as well as state enforcement."

b. The EPA's Evaluation

At the outset, the EPA notes that the Petitioner failed to include any discussion of the extensive prior litigation and administrative proceedings concerning this specific provision of the Georgia SIP. Nearly 10 years ago, citizen suit plaintiffs including the Petitioner sought to bring an enforcement action against a source for self-reported exceedances of emission limitations in the source's operating permit, and the source asserted that those exceedances were not "violations" through application of a permit provision that mirrored the underlying SIP provision in Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7).[119] In that case, the plaintiffs argued that the provision at issue was an "enforcement discretion" provision applicable to state personnel only and thus that it was not relevant in the event of enforcement actions by other parties. The District Court agreed and held that the provision was merely an enforcement discretion provision applicable to the state and that it provided no affirmative defense in the enforcement action, and thus the court ruled in favor of the plaintiffs on this issue.[120]

On appeal, the Court of Appeals examined the same operating permit language and underlying SIP provision and came to a different conclusion.[121] The Court of Appeals concluded that the provision does provide an affirmative defense and is not an enforcement discretion provision. Moreover, the Court noted that even if the provision is not consistent with the EPA's guidance on permissible affirmative defense provisions in SIPs (*e.g.*, because it creates exemptions for exceedances and purports to allow a complete bar to any liability, not just relief from monetary penalties), the EPA had not taken action through rulemaking to rectify that discrepancy. Because the EPA had not called upon the state to revise the SIP to bring it into compliance with the EPA's current interpretation of the CAA embodied in the 1999 SSM Guidance, the Court held that the exceedances of the applicable emission limitations were not violations and thus ruled against the plaintiffs.

Contemporaneously with this litigation, the Petitioner had also filed a May 23, 2005 petition for rulemaking, requesting that the EPA require the state to revise its SIP "to correct a significant ambiguity" concerning the excess emissions from SSM events.[122] On July 18, 2007, the EPA denied that petition.[123] As a basis for this denial, the EPA reasoned that the opinion of the Court of Appeals had rendered the petition moot as to the issues raised therein. Specifically, the EPA stated that the Court's decision that the existing provision did not create an "automatic exemption" and did constitute an "affirmative defense" resolved any "ambiguity" about the meaning and application of Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7).

At this juncture, the EPA believes that the extensive proceedings concerning Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7) in which plaintiffs, defendants, courts, and both state and federal agencies examined the same provision and came to different conclusions concerning its meaning illustrates the need to examine this SIP provision again. In particular, the EPA concludes that the provision warrants further evaluation on the merits, because the Petition requests that the EPA consider more specific allegations about deficiencies in the provision than did the 2005 petition. As the 11th Circuit Court of Appeals suggested, the EPA agrees that a formal notice-and-comment rulemaking though CAA section 110(k)(5) is a good mechanism through which to evaluate whether or not Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7) meets the substantive requirements of the CAA. Accordingly,

[118] Petition at 32.

[119] *See, Sierra Club, et al.* v. *Georgia Power Co.*, 365 F. Supp 1297 (N.D. Ga. 2004).

[120] *Id.* at 1304. The court also made a series of findings to illustrate that the permit provision was not consistent with the EPA's interpretation of the CAA requirements concerning excess emissions during SSM events embodied in the 1999 SSM Guidance.

[121] *See, Sierra Club, et al.* v. *Georgia Power Co.*, 443 F.3d 1346 (11th Cir. 2006).

[122] The petition was filed by Richard M. Watson of the Georgia Center for Law in the Public Interest on behalf of the Georgia Chapter of the Sierra Club.

[123] *See,* Letter from Stephen E. Johnson, Administrator, to Georgia Chapter of the Sierra Club, dated July 18, 2007. A copy of this letter is in the docket for this action.

the EPA is reevaluating the provision on the merits.[124]

The first concern with this provision is that it does create exemptions from the applicable emission limitations. The provision explicitly states that the "excess emissions resulting from startup, shutdown, malfunction of any source which occur though ordinary diligence is employed shall be allowed," *i.e.*, are exempt and not subject to enforcement for either monetary penalties or injunctive relief. The exemption for these excess emissions is conditioned upon several criteria relevant to minimizing emissions during the startup, shutdown, or malfunction event, which criteria are helpful and are structured as a form of affirmative defense. Even if Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7) could otherwise qualify as an affirmative defense provision, however, the EPA's interpretation of the CAA is that such affirmative defenses can only shield the source from monetary penalties and cannot be a bar to injunctive relief. An affirmative defense provision that purports to bar any enforcement action for violations of emission limitations is inconsistent with the requirements of CAA sections 113 and 304.

The EPA's second concern with Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7) is that while the provision appears to create an affirmative defense, it does so with conditions that are not consistent with the full range of criteria that the EPA recommends in the SSM Policy. The EPA acknowledges that the SSM Policy is only guidance concerning what types of SIP provisions could be consistent with the requirements of the CAA. Nonetheless, through this rulemaking, the EPA is proposing to determine that Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7) does not include criteria that are sufficiently robust to qualify as an acceptable affirmative defense provision. In particular, the provision does not limit the type of event that qualifies as a malfunction to those that are entirely beyond the control of the source, that were not reasonably foreseeable and avoidable, and that were not part of a recurring pattern indicative of inadequate design, operation, or maintenance. While the EPA continues to believe that affirmative defense provisions applying to malfunctions can be consistent with the CAA as long as the criteria set forth in the SSM Policy are carefully adhered to, as explained in more detail in sections IV.B and VII.B of this notice, the EPA believes that the criteria in Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7) should be augmented to assure that the affirmative defense is available only in appropriately narrow circumstances.

The EPA's third concern with Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7) is that even if the provision were otherwise construed as an affirmative defense, it extends not just to malfunctions but also to startup and shutdown events. As explained in sections IV.B and VII.C of this notice, the EPA interprets the CAA to allow affirmative defense provisions applicable to malfunctions but not to other normal modes of source operation, including startup and shutdown. Thus, the provision is not drawn to assure that the affirmative defense is available only in appropriately narrow circumstances, as required by the EPA's interpretation of CAA requirements.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7). The EPA believes that this provision allows for exemptions from the otherwise applicable emission limitations, and that such outright exemptions for excess emissions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. Such a provision is inconsistent with the requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k).

In addition, Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7) is not a permissible affirmative defense provision consistent with the requirements of the CAA and the EPA's recommendations for such provisions in the EPA's SSM Policy. By creating a bar to enforcement that applies not just to monetary penalties but also to injunctive relief, this provision is inconsistent with the requirements of CAA sections 113 and 304. By not including sufficient criteria to assure that sources seeking to raise the affirmative defense have in fact been properly designed, maintained, and operated, and to assure that sources have taken all appropriate steps to minimize excess emissions, the provision also fails to be sufficiently narrowly drawn to justify shielding from monetary penalties for violations. Moreover, Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7) currently applies not only to malfunctions but also to startup and shutdown events, contrary to the EPA's interpretation of the CAA. Thus, this provision is not appropriate as an affirmative defense provision because it is inconsistent with fundamental requirements of the CAA as interpreted in the EPA's SSM Policy. For these reasons, the EPA is proposing to find that Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7) is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

4. Kentucky

a. Petitioner's Analysis

The Petitioner objected to a generally applicable provision that allows discretionary exemptions from otherwise applicable SIP emission limitations in Kentucky's SIP (401 KAR 50:055 § 1(1)).[125] [126] The provision provides that "[e]missions which, due to shutdown or malfunctions, temporarily exceed the standard * * * shall be deemed in violation of such standards unless the requirements of this section are satisfied and the determinations specified in subsection (4) * * * are made." The provision requires sources to notify the director that such violations are going to or have occurred. The provision then provides that "[a] source shall be relieved from compliance with the standards * * * if the director determines" that the source has met a number of enumerated criteria.

The Petitioner argued that this provision could provide an exemption from the otherwise applicable SIP emission limitations, and such an exemption is impermissible under the CAA because the statute and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations. Moreover, the Petitioner objected to this discretionary exemption because the director's determination that the source has met the specified criteria could be interpreted to excuse excess emissions during such time period and could thus be read to preclude enforcement by the EPA or citizens in the event that the director elects not to treat the event as a violation. Thus, in addition to creating an impermissible exemption for the excess emissions, the Petitioner argued, the provision is also inconsistent with the CAA as interpreted in the EPA's SSM Policy because it allows the

[124] The EPA notes that it is not bound to follow a prior incorrect interpretation of its own policy, nor is it precluded from changing its policy interpretations. *See, e.g., Luminant Generation Co. v. EPA*, 699 F.3d 427 (5th Cir. 2012), and U.S. Supreme Court precedent cited therein for these propositions.

[125] Petition at 39–40.

[126] The EPA notes that the Petitioner also identified several additional pollutant-specific and source category-specific provisions in Kentucky's SIP that it alleged are inconsistent with the CAA and the EPA's SSM Policy. However, the Petitioner did not request that the EPA address those SIP provisions in its remedy request, and thus the EPA is not addressing those provisions in this action. The EPA may elect to evaluate those provisions in a later action.

director to make a unilateral decision that the excess emissions were not a violation and thus could bar enforcement for the excess emissions by the EPA and citizens.

The Petitioner noted that the criteria that sources must demonstrate to the director in order to qualify for the exemption "resemble the criteria that are supposed to guide a state's enforcement discretion for malfunctions," but that if the provision is not removed from the SIP, it "must stipulate that all excess emissions are violations and preserve the authority of EPA and citizens to enforce the SIP standards and limitations." Thus, the Petitioner viewed this provision as either an impermissible discretionary exemption mechanism or an impermissible enforcement discretion provision.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, or malfunctions are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The EPA believes that the inclusion of such an exemption from the emission limitations in 401 KAR 50:055 § 1(1) is thus a substantial inadequacy and renders this specific SIP provision impermissible.

The EPA believes that 401 KAR 50:055 § 1(1) is impermissible as an unbounded director's discretion provision that makes a state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation. In the case of 401 KAR 50:055 § 1(1), the provision authorizes the state official to make a determination that the source has met the specified criteria, and such a determination could be interpreted to excuse excess emissions during the event and could thus be read to preclude enforcement by the EPA or through a citizen suit. In addition, the provision vests a state official with the unilateral power to grant an exemption from the otherwise applicable SIP emission limitation, without any additional public process at the state or federal level. Most importantly, however, the provision authorizes a state official to create an exemption from the emission limitation, and such an exemption is impermissible in the first instance. Such a director's discretion provision undermines the SIP emission limitations, and the emissions reductions they are intended to achieve, and renders them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of an insufficiently bounded director's discretion provision in 401 KAR 50:055 § 1(1) is thus a substantial inadequacy and renders this specific SIP provision impermissible for this reason, in addition to the creation of an impermissible exemption.

The EPA also notes that after the submission of the Petition, there has been a subsequent regulatory action that touched upon this SIP provision tangentially. In connection with a redesignation of the Kentucky portion of the tri-state Cincinnati-Hamilton area for the 1997 $PM_{2.5}$ NAAQS, the state submitted an interpretive letter to the EPA explaining the state's reading of 401 KAR 50:055 § 1(1).[127] In this November 4, 2011 letter, the Kentucky Division of Air Quality (KDAQ) stated that it has "never formally taken the position that excess emissions under the regulations are not violations" and that a determination by KDAQ "does not limit" the authority of the EPA and citizens to take enforcement action.[128] Based on the state's interpretation of 401 KAR 50:055 § 1(1), the EPA at that time concluded that the provision could be construed not to bar enforcement by the EPA or through a citizen suit if the state elects not to pursue enforcement; *i.e.*, it could be construed as an enforcement discretion provision applicable to state personnel. In the context of acting upon the redesignation request under CAA section 107(d)(3), this clarification from the state was sufficient to address the concern raised in comments on that action. Nevertheless, the EPA noted in the redesignation action that it would evaluate 401 KAR 50:055 § 1(1) as part of its consideration of issues raised by the Petition.

At this juncture, the EPA believes that the difference of views about the correct reading of 401 KAR 50:055 § 1(1) illustrates the need to examine this SIP provision again. The EPA appreciates KDAQ's clarification of its reading of the provision in the November 4, 2011, letter and the EPA considers that interpretation sufficient for purposes of the redesignation action. However, in the course of reevaluating this provision in light of the issues raised in the Petition, the EPA believes that the provision contains regulatory language that is potentially contradictory and requires formal revision to eliminate significant ambiguities. For example, subsection 1 of the provision states that: "[e]missions which, due to shutdown or malfunctions, temporarily exceed the standard * * * shall be deemed in violation of such standards unless the requirements of this section are satisfied." In subsection 4, the provision states that "a source shall be relieved from compliance with the standards * * * if the director determines, upon a showing by the owner or operator of the source, that" certain conditions are met. KDAQ has indicated that it reads these provisions not to bar enforcement by the EPA or through a citizen suit in the event that the state does not pursue enforcement, but the EPA believes that the provision is sufficiently ambiguous on this point that a revision is necessary to ensure that outcome in the event of an enforcement action.

As discussed in section VI.B of this notice, the EPA believes that in some instances it is appropriate to clarify provisions of a SIP through the use of interpretive letters. However, in some cases, there may be areas of regulatory ambiguity in a SIP's provisions that are sufficiently significant for which resolution is both appropriate and necessary. Because the text of Kentucky's SIP provision is not clearly phrased in terms of the state's exercise of enforcement discretion and could be interpreted to allow discretionary exemptions from the otherwise applicable SIP emission limitations or as an affirmative defense provision inconsistent with the criteria recommended in the EPA's SSM Policy, the EPA believes that the provision is substantially inadequate to meet CAA requirements.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to 401 KAR 50:055 § 1(1). The EPA believes that this provision requires clarification to ensure that it meets CAA requirements.

[127] *See*, "Approval and Promulgation of Implementation Plans and Designations of Areas for Air Quality Planning Purposes; Kentucky; Redesignation of the Kentucky Portion of the Cincinnati-Hamilton, OH–KY–IN 1997 Annual Fine Particulate Matter Nonattainment Area to Attainment," 76 FR 77903 (Dec. 15, 2011).

[128] A copy of this letter can be found in the docket for this rulemaking.

The current provision could be read to allow for exemptions from the otherwise applicable SIP emission limitations, and such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs in sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, 401 KAR 50:055 § 1(1) could be read to allow exemptions through a state official's unilateral exercise of discretionary authority that is insufficiently bounded and includes no additional public process at the state or federal level, and such provisions are inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions. Moreover, the provision could be read to create discretion to allow case-by-case exemptions from emission limitations when such exemptions are not permissible in the first instance. In light of the potential conflicts between the provision and the differing interpretations that parties or a court might give the provision in an enforcement action, the EPA is proposing to find that 401 KAR 50:055 § 1(1) is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

5. Kentucky: Jefferson County

a. Petitioner's Analysis

First, the Petitioner objected to a generally applicable provision in the Jefferson County Air Regulations 1.07 because it provides for discretionary exemptions from compliance with emission limitations during startup, shutdown, and malfunction.[129] [130] The provision states that "[e]missions due to startup, shutdown, malfunction, or emergency, that temporarily exceed the standards * * * shall be deemed in violation of those standards unless, based upon a showing by the owner or operator of the source and an affirmative determination by the District, the applicable requirements of this regulation are satisfied." The provision requires different demonstrations for exemptions for excess emissions during startup and shutdown (Regulation 1.07 § 3), malfunction (Regulation 1.07 § 4 and § 7), and emergency (Regulation 1.07 § 5 and § 7).

The Petitioner argued that this provision could provide exemptions from the otherwise applicable SIP emission limitations, and that such exemptions are impermissible under the CAA because the statute and the EPA's interpretation of the CAA in the SSM Policy require that all excess emissions be treated as violations. The Petitioner objected to this provision as allowing discretionary exemptions, because a local official's determination that the source has met the specified criteria could be interpreted to excuse excess emissions during such events and could thus be read to preclude enforcement by the EPA or citizens if the district elects not to treat the event as a violation.

Second, the Petitioner objected to the affirmative defense for emergencies in Jefferson County Air Regulations 1.07. The Petitioner noted that the SIP provision "mirrors the language in 40 C.F.R. § 70.6(g)" in the EPA's own title V regulations. Thus, the Petitioner argued that the provision should not be included in the SIP because it is modeled on the EPA's own title V regulations, and such regulations do not belong in the SIP. The Petitioner also argued that even if the provision were appropriate as a SIP provision, it is deficient because it is not a "true affirmative defense." On the latter point the Petitioner argued that a "true affirmative defense" is a defense to be asserted by the source in the context of a judicial or administrative enforcement proceeding. The Petitioner opined that the emergency affirmative defense in Jefferson County Air Regulations 1.07 "appears to allow the District to decide whether the defense applies."

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a government official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, load change, or emergencies are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The EPA believes that the inclusion of such an exemption from the emission limitations in Jefferson County Air Regulations 1.07 is thus a substantial inadequacy and renders this specific SIP provision impermissible.

The EPA believes that Regulation 1.07 is also impermissible as an insufficiently bounded director's discretion provision that makes a local official the unilateral arbiter of whether the excess emissions in a given event constitute a violation. In the case of Regulation 1.07, the provision authorizes local officials to make a determination that the source has met the specified criteria for each type of event—startup and shutdown (Regulation 1.07 § 3), malfunction (Regulation 1.07 § 4), emergency (Regulation 1.07 § 5), and extended malfunction or emergency (Regulation 1.07 § 7). The local official's "affirmative determination" that such requirements have been met has the effect of excusing the excess emissions (Regulation 1.07 § 2.1). This determination could be interpreted to preclude enforcement by the EPA or through a citizen suit. In addition, the provision vests the local official with the unilateral power to grant an exemption from the otherwise applicable SIP emission limitations, without any additional public process at the state or federal level. Most importantly, however, the provision authorizes the local official to create an exemption from the emission limitation, and such an exemption is impermissible in the first instance. Such a director's discretion provision undermines the emission limitations, and the emissions reductions they are intended to achieve, and renders them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of an insufficiently bounded director's discretion provision in Regulation 1.07 is thus a substantial inadequacy and renders this specific SIP provision impermissible for this reason, in addition to the creation of an impermissible exemption.

The EPA also agrees that Regulation 1.07 provides an impermissible exemption for excess emissions that occur during "emergencies." The provision uses language that is borrowed from the EPA's title V regulations (Regulation 1.07 § 5) but that is not appropriate for a SIP provision (*see* section VII.D of this notice). In addition, because Regulation 1.07 § 2.1 provides that the district may make a determination of whether "applicable requirements" of the regulation are "satisfied," and the affirmative defense

[129] The Petitioner noted that this regulation was approved into Kentucky's SIP in "Approval and Promulgation of Air Quality Implementation Plans; Kentucky; Approval of Revisions to State Implementation Plan; Revised Format for Materials Being Incorporated by Reference for Jefferson County, Kentucky," 66 FR 53503 at 53660 (Oct. 23, 2001).

[130] Petition at 40–42.

for emergencies is defined as one such "applicable requirement," the structure of Regulation 1.07 could be read as providing the district with the unilateral discretion to decide that the source has met the conditions for the affirmative defense. The EPA agrees with the Petitioner that affirmative defenses are only permitted in the context of an enforcement proceeding and cannot be granted unilaterally by a state agency, because this would have the effect of precluding the EPA or the public from taking enforcement action.

Regulation 1.07 also does not explicitly limit the affirmative defense for emergency events to civil penalties. Although the EPA believes that narrowly drawn affirmative defenses are permitted under the CAA for malfunction events (*see* sections IV.B and VII.B of this notice), the EPA's interpretation of the CAA is that affirmative defenses can only shield the source from monetary penalties and cannot be a bar to injunctive relief. An affirmative defense provision that purports to bar any enforcement action for injunctive relief for violations of emission limitations is inconsistent with the requirements of CAA sections 113 and 304. In addition, the provision does not contain elements for establishing the affirmative defense consistent with all of the recommended criteria in the EPA's SSM Policy. The EPA acknowledges that the SSM Policy is only guidance concerning what types of SIP provisions could be consistent with the requirements of the CAA. Nonetheless, through this rulemaking, the EPA is proposing to determine that Regulation 1.07 does not include criteria that are sufficiently robust to qualify as an acceptable affirmative defense provision for purposes of SIP requirements.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Jefferson County Air Regulation 1.07.[131] The EPA believes that this provision allows for exemptions from the otherwise applicable SIP emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs in sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, Regulation 1.07 allows for such exemptions through a local official's unilateral exercise of discretionary authority that is insufficiently bounded and includes no additional public process at the state or federal level, and such provisions are inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions. Moreover, the discretion created by these provisions allows case-by-case exemptions from emission limitations, when such exemptions are not permissible in the first instance. For these reasons, the EPA is proposing to find that Regulation 1.07 is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

The EPA also proposes to grant the Petition because Regulation 1.07 contains an impermissible exemption for excess emissions during emergency events, conditioned upon an affirmative defense provision that is inconsistent with the criteria recommended in the EPA's SSM Policy. Regulation 1.07 can be read to authorize the district to grant an exemption under § 2.1 and § 5, and such an interpretation could preclude the EPA and the public from bringing an enforcement action. Furthermore, the affirmative defense provision is impermissible because it does not explicitly limit the defense to monetary penalties, and it does not include sufficient criteria to assure that sources seeking to raise the affirmative defense have in fact been properly designed, maintained, and operated, and to assure that sources have taken all appropriate steps to minimize excess emissions. The provision therefore also fails to be sufficiently narrowly drawn to justify shielding from monetary penalties for violations. For these reasons, the EPA is proposing to find that Regulation 1.07 is substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to this provision.

6. Mississippi

a. Petitioner's Analysis

The Petitioner objected to two generally applicable provisions in the Mississippi SIP that allow for affirmative defenses for violations of otherwise applicable SIP emission limitations during periods of upset, *i.e.*, malfunctions (11–1–2 Miss. Code R. § 10.1) and unavoidable maintenance (11–1–2 Miss. Code R. § 10.3).[132] First, the Petitioner objected to both of these provisions based on its assertion that the CAA allows no affirmative defense provisions in SIPs. Second, the Petitioner asserted that even if affirmative defense provisions were permissible under the CAA, the affirmative defenses in these provisions "fall far short of the EPA policy." Specifically, the Petitioner argued that the EPA's guidance for affirmative defenses recommends that they "are not appropriate where a single source or a small group of sources has the potential to cause an exceedance of the NAAQS or PSD increments," [133] and Mississippi's provisions do not contain a restriction to address this point. Further, the Petitioner argued that the affirmative defenses in Mississippi's SIP are not limited to actions seeking civil penalties and that they fail to meet other criteria "that EPA requires for acceptable defense provisions." [134] Finally, the Petitioner argued that the CAA and the EPA's SSM Policy interpreting it do not allow affirmative defenses for excess emissions during maintenance events under any circumstances.

The Petitioner also objected to a generally applicable provision that provides an exemption from otherwise applicable SIP emission limitations during startup and shutdown (11–1–2 Miss. Code R. § 10.2).[135] Within that provision, 11–1–2 Miss. Code R. § 10.2(a)(2) specifies that emission limitations apply during startup and shutdown except "when a startup or shutdown is infrequent, the duration of the excess emissions is brief in each event, and the design of the source is such that the period of excess emissions cannot be avoided without causing damage to the equipment or persons." The Petitioner argued that such an exemption is inconsistent with the requirements of the CAA and the EPA's SSM Policy. The Petitioner argued that the CAA and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations.

b. The EPA's Evaluation

The EPA disagrees with the Petitioner's contention that no affirmative defense provisions are permissible in SIPs under the CAA. As explained in more detail in section IV of this notice, the EPA interprets the CAA to allow affirmative defense provisions for malfunctions. So long as these provisions are narrowly drawn and consistent with the CAA, as recommended in the EPA's guidance for affirmative defense provisions in SIPs,

[131] The EPA notes that Kentucky has recently made a SIP submission that includes revisions to the portion of the SIP applicable to Jefferson County that would amend Regulation 1.07. In this action, the EPA is only evaluating Regulation 1.07 as currently approved into the SIP. The EPA is not evaluating the more recent SIP submission as part of this action. The EPA will address the SIP submission in a later action.

[132] Petition at 47–49.

[133] Petition at 48.

[134] Petition at 47–48.

[135] Petition at 47–49.

the EPA believes that states may elect to have affirmative defense provisions for malfunctions.

The EPA agrees, however, that the affirmative defense contained in 11–1–2 Miss. Code R. § 10.1 for upsets is not an acceptable affirmative defense provision under the CAA as interpreted in the EPA's SSM Policy. Section 10.1 provides that "[t]he occurrence of an upset * * * constitutes an affirmative defense to an enforcement action brought for noncompliance with emission standards," conditioned upon the source meeting a series of criteria. Although the EPA believes that narrowly drawn affirmative defenses are permitted under the Act for malfunction events (*i.e.*, upsets) (*see* section VII.B of this notice), the EPA's interpretation of the CAA is that an affirmative defense can only shield the source from monetary penalties and cannot be a bar to injunctive relief. The provisions of 11–1–2 Miss. Code R. § 10.1 applicable to upsets appears to create a bar not just to monetary penalties but also to injunctive relief. An affirmative defense provision that purports to bar any enforcement action for injunctive relief for violations of emission limitations is inconsistent with the requirements of CAA sections 113 and 204.

In addition, the EPA agrees that 11–1–2 Miss. Code R. § 10.1 creates an affirmative defense for upsets with conditions that are not fully consistent with the criteria that the EPA recommends in the SSM Policy. The EPA acknowledges that the SSM Policy is only guidance concerning what types of SIP provisions could be consistent with the requirements of the CAA. Nonetheless, through this rulemaking, the EPA is proposing to determine that 11–1–2 Miss. Code R. § 10.1 does not include criteria that are sufficiently robust to qualify as an acceptable affirmative defense provision. Although this provision does contain many criteria that are comparable to those the EPA recommends, it does not address several that the EPA believes to be necessary to assure that the affirmative defense is available only in appropriate circumstances. For example, 11–1–2 Miss. Code R. § 10.1 does not contain criteria requiring the source to show that the malfunction event was not part of a recurring pattern indicative of inadequate design, operation, or maintenance. In addition, as discussed in section VII.B of this notice, the EPA believes that affirmative defense provisions should address the issue of single sources or groups of sources that have the potential to have adverse impacts on the NAAQS or PSD increments in one of two recommended ways. On its face, 11–1–2 Miss. Code R. § 10.1 does not appear to address this issue in either way. The EPA believes that the inclusion of the bar to enforcement for injunctive relief and the insufficiently robust qualifying criteria render 11–1–2 Miss. Code R. § 10.1 substantially inadequate to meet CAA requirements.

The EPA also agrees with the Petitioner that the affirmative defense for excess emissions during maintenance provided in 11–1–2 Miss. Code R. § 10.3 is not consistent with CAA requirements. As explained in sections IV and VII.C of this notice, the EPA believes that affirmative defenses are only permissible under the CAA in the case of events that are beyond the control of the source, *i.e.*, malfunctions. Affirmative defense provisions are not appropriate in the case of planned source actions, such as maintenance, because sources should be expected to comply with applicable emission limitations during those normal planned and predicted modes of source operation. Although this provision does contain parameters to limit its availability, it still provides an affirmative defense that is inconsistent with CAA requirements. The EPA believes that the inclusion of the affirmative defense for excess emissions during maintenance in 11–1–2 Miss. Code R. § 10.3 renders that provision substantially inadequate to meet CAA requirements.

The EPA also agrees that 11–1–2 Miss. Code R. § 10.2(a)(2) contains an exemption for excess emissions during startup and shutdown events that is inconsistent with CAA requirements. The EPA acknowledges that the state has imposed some parameters on the scope of the exemption by requiring that the events be infrequent, of short duration, and required to avoid damage to equipment or people. However, the EPA does not interpret the CAA to allow for exemptions for excess emissions during startup and shutdown. As discussed in section VII.A of this notice, the EPA believes that sources should be designed, operated, and maintained so that they can comply with applicable SIP emission limitations during normal modes of source operation. If appropriate, the state may elect to develop special emission limitations or other control measures that apply during startup and shutdown. The EPA believes that the inclusion of an exemption for excess emissions during startup and shutdown in 11–1–2 Miss. Code R. § 10.2 is substantially inadequate to meet CAA requirements.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to 11–1–2 Miss. Code R. § 10.1, 11–1–2 Miss. Code R. § 10.2, and 11–1–2 Miss. Code R. § 10.3. None of these provisions is consistent with the requirements of the CAA as interpreted in the EPA's recommendations in the EPA's SSM Policy. The EPA believes that 11–1–2 Miss. Code R. § 10.1 and 11–1–2 Miss. Code R. § 10.3 create affirmative defenses that are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, by purporting to create a bar to enforcement that applies not just to monetary penalties but also to injunctive relief, these provisions are inconsistent with the requirements of CAA sections 113 and 304. By not including sufficient criteria to assure that sources seeking to raise these affirmative defenses have in fact been properly designed, maintained, and operated, and to assure that sources have taken all appropriate steps to minimize excess emissions, 11–1–2 Miss. Code R. § 10.1 also fails to be sufficiently narrowly drawn to justify shielding from monetary penalties for violations. The comparable affirmative defense for maintenance in 11–1–2 Miss. Code R. § 10.3 is not consistent with CAA requirements because maintenance is a normal mode of source operation during which the source should be expected to comply with the applicable emission limitations. Thus, these provisions are not appropriate as affirmative defense provisions because they are inconsistent with fundamental requirements of the CAA.

The EPA is proposing to find that 11–1–2 Miss. Code R. § 10.2 is substantially inadequate to meet CAA requirements because it provides an exemption for excess emissions that occur during startup and shutdown, which are normal modes of source operation during which sources should comply with applicable emission limitations. Such an exemption provision is inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k).

For these reasons, the EPA is proposing to find that these provisions are substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to these provisions.

7. North Carolina

a. Petitioner's Analysis

The Petitioner objected to two generally applicable provisions in the North Carolina SIP that provide exemptions for emissions exceeding otherwise applicable SIP emission limitations at the discretion of the state agency during malfunctions (15A N.C. Admin. Code 2D.0535(c)) and during startup and shutdown (15A N.C. Admin. Code 2D.0535(g)).[136] The Petitioner argued that both provisions allow a state official to exempt sources from compliance with otherwise applicable SIP emission limitations, and therefore both provisions allow a state official to decide whether a violation has occurred. This decision would preclude enforcement action by the EPA and citizens for both civil penalties and injunctive relief, and such an interpretation is inconsistent with the CAA and the EPA's SSM policy interpreting the CAA. The Petitioner noted that the director's discretion provision for malfunctions provided by 15A N.C. Admin. Code 2D.0535(c) is limited to 15 percent of operating time during each calendar year. According to the Petitioner, this temporal limit does not render the provision permissible under the CAA and the EPA's SSM policy interpreting the CAA, because the limit "does nothing to ensure that ambient air quality standards are met."[137]

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitations must be considered violations, whether or not the state elects to exercise its enforcement discretion.

The EPA believes that 15A N.C. Admin. Code 2D.0535(c) and 15A N.C. Admin. Code 2D.0535(g) are impermissible as insufficiently bounded director's discretion provisions. The explicit text of 15A N.C. Admin. Code 2D.0535(c) states that "[a]ny excess emissions * * * are considered a violation * * * unless the owner or operator of the source of excess emissions demonstrates to the Director, that the excess emissions are the result of a malfunction." Similarly, 15A N.C. Admin. Code 2D.0535(g) provides that a state official may determine that excess emissions during startup and shutdown are unavoidable, in which case emissions exceeding the otherwise applicable SIP limitations are not considered violations. These provisions vest the state official with unilateral power to grant an exemption from the otherwise applicable SIP emission limitation, without any public process at the state or federal level. Such a determination that the excess emissions in a given event do not constitute a violation could preclude enforcement by the EPA or through a citizen suit. While both provisions contain a list of factors that the state official "shall consider" in making the discretionary determination, they nevertheless empower the state official to create an exemption from the emission limitations, and such an exemption is impermissible in the first instance. Such a director's discretion provision undermines the emission limitations in the SIP, and the emissions reductions they are intended to achieve, and renders them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of an insufficiently bounded director's discretion provision in 15A N.C. Admin. Code 2D.0535(c) and 15A N.C. Admin. Code 2D.0535(g) is thus a substantial inadequacy and renders these specific SIP provisions impermissible for this reason.

Finally, the EPA notes that 15A N.C. Admin. Code 2D.0535(c) and 15A N.C. Admin. Code 2D.0535(g) contain a number of criteria for consideration by the state official when deciding whether the excess emissions should be treated as exempt and thus not as a violation. Superficially, these criteria are similar to those recommended by the EPA for affirmative defense provisions for malfunctions to meet CAA requirements, but they are not presented as criteria for an affirmative defense. Instead, each provision is structured so that if the source has met these criteria, the state official will deem the excess emissions not a violation. Moreover, instead of requiring that the source establish these facts in an administrative or judicial process, the provision appears to authorize the state official to make a unilateral determination whether the emissions are a violation and thus appears to bar enforcement by the EPA or through a citizen suit.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to 15A N.C. Admin. Code 2D.0535(c) and 15A N.C. Admin. Code 2D.0535(g). The EPA believes that both of these provisions could be read to allow for exemptions from otherwise applicable SIP emission limitations through a state official's unilateral exercise of discretionary authority that is insufficiently bounded and includes no additional public process at the state or federal level. Moreover, the discretion created by this provision could be read to allow case-by-case exemptions from emission limitations when such exemptions are not permissible in the first instance. Such exemption provisions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, by creating these impermissible exemptions, the state has defined violations in a way that would interfere with effective enforcement by the EPA and citizens for excess emissions during these events as provided in CAA sections 113 and 304. For these reasons, the EPA is proposing to find 15A N.C. Admin. Code 2D.0535(c) and 15A N.C. Admin. Code 2D.0535(g) are substantially inadequate to meet CAA requirements and thus is proposing to issue a SIP call with respect to these provisions.

8. North Carolina: Forsyth County

a. Petitioner's Analysis

The Petitioner objected to two generally applicable provisions in the Forsyth County Code that provide exemptions for emissions exceeding otherwise applicable SIP emission limitations at the discretion of a local official during malfunctions (Forsyth County Code, ch. 3, 3D.0535(c)) and startup and shutdown (Forsyth County Code, ch. 3, 3D.0535(g)).[138] The Petitioner argued that these "local regulations have the same problems as the [North Carolina] state-wide regulations" addressed in the previous section.[139] The Petitioner argued that both provisions allow the local official to exempt sources from compliance with otherwise applicable SIP emission limitations, and therefore both provisions allow the local official to decide whether a violation has occurred. This decision would preclude action by the EPA and citizens for both civil penalties and injunctive relief, and such a provision is inconsistent with the

[136] Petition at 57–58.
[137] Petition at 58.
[138] Petition at 58.
[139] Petition at 58.

CAA and the EPA's SSM policy interpreting the CAA.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a government official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitations must be considered violations, whether or not the state elects to exercise its enforcement discretion.

The EPA believes that Forsyth County Code, ch. 3, 3D.0535(c) and Forsyth County Code, ch. 3, 3D.0535(g) are impermissible as insufficiently bounded director's discretion provisions. Forsyth County Code, ch. 3, 3D.0535(c) states that "[a]ny excess emissions * * * are considered a violation * * * unless the owner or operator of the source of excess emissions demonstrates to the Director, that the excess emissions are the result of a malfunction." Similarly, Forsyth County Code, ch. 3, 3D.0535(g) provides that a local official may determine that excess emissions during startup and shutdown are unavoidable, in which case emissions exceeding the otherwise applicable SIP limitations are not considered violations. These provisions vest the local official with unilateral power to grant an exemption from the otherwise applicable SIP emission limitation, without any public process at the local, state, or federal level. Such a determination that the excess emissions in a given event do not constitute a violation could preclude enforcement by the EPA or through a citizen suit. While both provisions contain a list of factors that the local official "shall consider" in making the discretionary determination, they nevertheless empower the local official to create an exemption from the emission limitation, and such an exemption is impermissible in the first instance. Such a director's discretion provision undermines the emission limitations in the SIP, and the emissions reductions they are intended to achieve, and renders them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of an insufficiently bounded director's discretion provision in Forsyth County Code, ch. 3, 3D.0535(c) and Forsyth County Code, ch. 3, 3D.0535(g) is thus a substantial inadequacy and renders these specific SIP provisions impermissible for this reason.

As with the comparable statewide SIP provisions, the EPA notes that Forsyth County Code, ch. 3, 3D.0535(c) and Forsyth County Code, ch. 3, 3D.0535(g) also would not qualify as affirmative defense provisions consistent with CAA requirements. The provisions authorize the local official to deem excess emissions exempt and thus not subject to enforcement for injunctive relief. The provisions also appear to authorize the local official to make a unilateral determination that the emissions are not a violation and thus to bar enforcement by the EPA or through a citizen suit.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Forsyth County Code, ch. 3, 3D.0535(c) and Forsyth County Code, ch. 3, 3D.0535(g). The EPA believes that both of these provisions could be read to allow for exemptions from otherwise applicable SIP emission limitations through a local official's unilateral exercise of discretionary authority that is insufficiently bounded and includes no additional public process at the local, state, or federal level. Moreover, the discretion created by this provision could be read to allow case-by-case exemptions from emission limitations when such exemptions are not permissible in the first instance. Such exemption provisions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, by creating these impermissible exemptions, the air agency has defined violations in a way that would interfere with effective enforcement by the EPA and citizens for excess emissions during these events as provided in CAA sections 113 and 304. For these reasons, the EPA is proposing to find that Forsyth County Code, ch. 3, 3D.0535(c) and Forsyth County Code, ch. 3, 3D.0535(g) are substantially inadequate to meet CAA requirements and thus is proposing to issue a SIP call with respect to these provisions.

9. South Carolina

a. Petitioner's Analysis

The Petitioner objected to three provisions in the South Carolina SIP, arguing that they contained impermissible source category- and pollutant-specific exemptions.[140] The Petitioner characterized these provisions as providing exemptions from opacity limits for fuel-burning operations for excess emissions that occur during startup or shutdown (S.C. Code Ann. Regs. 61–62.5 St 1(C)), exemptions from NOx limits for special-use burners that are operated less than 500 hours per year (S.C. Code Ann. Regs. 61–62.5 St 5.2(I)(b)(14)), and exemptions from sulfur limits for kraft pulp mills for excess emissions that occur during startup, shutdown, or malfunction events (S.C. Code Ann. Regs. St 4(XI)(D)(4)). The Petitioner argued that such exemptions violate the fundamental CAA requirement that all excess emissions be considered violations and that they interfere with enforcement by the EPA and citizens.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations. In accordance with CAA sections 110(a)(2)(A) and 302(k), SIPs must contain "emission limitations" and those limitations must be continuous. Thus, any excess emissions above the level of the applicable SIP emission limitation must be considered a violation of such limitation, regardless of whether the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, maintenance, or malfunctions are not violations of the applicable SIP emission limitations are inconsistent with the fundamental requirements of the CAA.

The first provision identified by the Petitioner states that "[t]he opacity standards set forth above do not apply during startup or shutdown." The EPA agrees with the Petitioner that the effect of this language is to exempt excess emissions that occur during startup or shutdown from otherwise applicable opacity standards, essentially treating such emissions as non-violations. The EPA believes that such automatic exemptions are impermissible under the CAA. By having SIP provisions that define what would otherwise be violations of the applicable SIP emission limitations as non-violations, the state has effectively negated the ability of the EPA or the public to enforce against those violations. Therefore, the EPA believes that the inclusion of such an automatic exemption in S.C. Code Ann. Regs. 61–62.5 St 1(C) is impermissible and renders the provision a substantial inadequacy under the CAA.

With respect to the Petitioner's second objection relating to the exemption for special-use burners, however, the EPA disagrees with the

[140] Petition at 65–66.

Petitioner's characterization of the provision. S.C. Code Ann. Regs. 61–62.5 St 5.2(I)(b)(14) provides: "The following sources are exempt from all requirements of this regulation unless otherwise specified: * * * (14) Special use burners, such as start-up/shut-down burners, that are operated less than 500 hours a year." The Petitioner argued that this provision provides an exemption from otherwise applicable NOx limitations for excess emissions that occur during startup or shutdown. Although this provision superficially resembles an exemption for emissions during startup and shutdown, the EPA interprets this provision merely to define a specific source category—special-use burners—that is not subject to control under S.C. Code Ann. Regs. 61–62.5 St 5.2, *Control of Oxides of Nitrogen (NO_X)*. In other words, the provision reflects that regulation of special-use burners is not necessary in order to meet the applicable RACT requirements or any other CAA requirements for NO_X emissions in this area. Rather than an exemption for NO_X emissions during startup and shutdown for a source category that is regulated for NO_X, this provision merely reflects that this category of source is not subject to regulation under S.C. Code Ann. Regs. 61–62.5 St 5.2. Therefore, the EPA disagrees with the Petitioner that S.C. Code Ann. Regs. 61–62.5 St 5.2(I)(b)(14) renders the South Carolina SIP substantially inadequate.

Finally, the EPA agrees that S.C. Code Ann. Regs. St 4(XI)(D)(4) implicitly includes impermissible exemptions for excess emissions during startup, shutdown, and malfunction events for the affected sources. The provision states that "[t]he Department will consider periods of excess emissions reported under Subpart D(3) of this section to be indicative of a violation if" the emissions from the specified source categories exceed certain limits over certain time periods. For example, for recovery furnaces, S.C. Code Ann. Regs. St 4(XI)(D)(4)(b) specifies that excess emissions will be "indicative of a violation" if "(a) the number of 12 hour exceedances from recovery furnaces is greater than 1% of the total number of contiguous 12 hour periods in a quarter (excluding periods of startup, shutdown, or malfunction * * *)." The parenthetical explicitly excludes the excess emissions that occur during startup, shutdown, and malfunction, automatically treating those emissions as non-violations. The other two source category-specific provisions to be considered in determining whether excess emissions are indicative of a violation contain similar parenthetical exclusions. Therefore, these provisions could reasonably be construed to preclude the EPA and the public from enforcing against violations that occur during these SSM events at these sources. The EPA believes that S.C. Code Ann. Regs. St 4(XI)(D)(4) includes automatic exemptions for excess emissions during SSM events for the three categories of sources and is thus substantially inadequate to satisfy CAA requirements.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to S.C. Code Ann. Regs. 61–62.5 St 1(C). The EPA believes that S.C. Code Ann. Regs. 61–62.5 St 1(C) allows for an exemption from otherwise applicable SIP emission limitations and that such exemptions are inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). The EPA also proposes to grant the Petition with respect to S.C. Code Ann. Regs. St 4(XI)(D)(4). This provision appears to define violations at three source categories in a way that excludes excess emissions that occur during SSM events. It is unclear whether this provision is intended only to apply to the exercise of enforcement discretion by state personnel, but the EPA believes that it could reasonably be interpreted to preclude the EPA and citizen enforcement as well. Because S.C. Code Ann. Regs. St 4(XI)(D)(4) appears to define violations of the applicable emission limitations in a way that excludes excess emissions during SSM events, it is inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For these reasons, the EPA is proposing to find that S.C. Code Ann. Regs. 61–62.5 St 1(C) and S.C. Code Ann. Regs. St 4(XI)(D)(4) are substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to these provisions.

However, the EPA proposes to deny the Petition with respect to S.C. Code Ann. Regs. 61–62.5 St 5.2(I)(b)(14), which does not exempt excess emissions from an otherwise applicable SIP emission limitation during startup and shutdown but rather excludes a specific source category from regulation under the South Carolina SIP, because such regulation was deemed unnecessary to meet other applicable CAA requirements. As a consequence, this provision does not constitute a substantial inadequacy in the SIP.

10. Tennessee

a. Petitioner's Analysis

The Petitioner objected to three provisions in the Tennessee SIP.[141] First, the Petitioner objected to two provisions that authorize a state official to "excuse or proceed upon" (Tenn. Comp. R. & Regs. 1200–3–20–.07(1)) violations of otherwise applicable SIP emission limitations that occur during "malfunctions, startups, and shutdowns" (Tenn. Comp. R. & Regs. 1200–3–20–.07(3)). The Petitioner argued that together, these provisions constitute a "blanket exemption from enforcement at the unfettered discretion of" a state official. Further, the Petitioner contended that once a violation has been "excused" by the state official, that decision could preclude enforcement by the EPA or citizens in violation of the CAA.

Second, the Petitioner objected to a provision that excludes excess visible emissions from the requirement that the state automatically issue a notice of violation for all excess emissions (Tenn. Comp. R. & Regs. 1200–3–5–.02(1)). This provision states that "due allowance may be made for visible emissions in excess of that permitted in this chapter which are necessary or unavoidable due to routine startup and shutdown conditions." The Petitioner argued that Tenn. Comp. R. & Regs. 1200–3–5–.02(1) is inconsistent with EPA's interpretation of the CAA because it operates as a blanket exemption for opacity violations.

b. The EPA's Evaluation

While the Petitioner suggested that Tenn. Comp. R. & Regs. 1200–3–20–.07(1) and Tenn. Comp. R. & Regs. 1200–3–20–.07(3) combine to operate as an impermissible discretionary exemption, the EPA believes that these provisions are better understood as attempting to provide the state agency with the discretion to decide whether to pursue an enforcement action. As discussed more fully in section IX.A of this notice, the EPA's SSM Policy has consistently encouraged states to utilize traditional enforcement discretion within appropriate bounds for violations relating to excess emissions that occur during SSM events. Moreover, the 1982 SSM Guidance explicitly recommended criteria that states might consider in the event that they elected to formalize their enforcement discretion with provisions in the SIP. However, such enforcement discretion provisions in a SIP must be "state-only," meaning that the

[141] Petition at 67–69.

provisions apply only to the state's own enforcement personnel and not to the EPA or to others. Here, the Tennessee SIP goes too far because a court could reasonably conclude that the provisions in question preclude the EPA and the public from enforcing against violations that occur during SSM events if the state official chooses to "excuse" such violations. Therefore, the EPA ultimately agrees with the Petitioner that Tenn. Comp. R. & Regs. 1200–3–20–.07(1) and Tenn. Comp. R. & Regs. 1200–3–20–.07(3) are substantially inadequate to satisfy CAA requirements.

In regard to Tenn. Comp. R. & Regs. 1200–3–5–.02(1), the EPA agrees with the Petitioner that this provision operates as an impermissible discretionary exemption because it allows a state official to excuse excess visible emissions after giving "due allowance" to the fact that they were emitted during startup or shutdown events. The EPA believes that this provision is impermissible because it creates unbounded discretion that purports to make a state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation of otherwise applicable SIP emission limitations. More importantly, the provision purports to authorize the state official to create exemptions from applicable SIP emission limitations when such exemptions are impermissible in the first instance. As discussed in more detail in section VII.A of this notice, these types of director's discretion provisions undermine the purpose of emission limitations and the reductions they are intended to achieve, thereby rendering them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of such a director's discretion provision in Tenn. Comp. R. & Regs. 1200–3–5–.02(1) is therefore a substantial inadequacy that renders the provision impermissible under the CAA.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Tenn. Comp. R. & Regs. 1200–3–20–.07(1) and Tenn. Comp. R. & Regs. 1200–3–20–.07(3). These enforcement discretion provisions could reasonably be interpreted to preclude EPA and citizen enforcement of applicable SIP emission limitations, in violation of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). The EPA also proposes to grant the Petition with respect to Tenn. Comp. R. & Regs. 1200–3–5–.02(1). The discretion created by this provision allows for revisions of the applicable SIP emission limitations without meeting the applicable SIP revision requirements of the CAA, and it allows case-by-case exemptions from emission limitations when such exemptions are not permissible in the first instance. Thus, this provision is also inconsistent with CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For these reasons, the EPA is proposing to find that these provisions are substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to these provisions.

11. Tennessee: Knox County

a. Petitioner's Analysis

The Petitioner objected to a provision in the Knox County portion of the Tennessee SIP that bars evidence of a violation of SIP emission limitations from being used in a citizen enforcement action (Knox County Regulation 32.1(C)).[142] The provision specifies that "[a] determination that there has been a violation of these regulations or orders issued pursuant thereto shall not be used in any law suit brought by any private citizen." The Petitioner argued that this provision would prevent reports of SSM conditions, which owners and operators are required to submit per Knox County Regulation 34.1(A), from being used as evidence in citizen suits, thereby undermining the express authorization of citizen enforcement actions under the CAA.

b. The EPA's Evaluation

The EPA agrees with the Petitioner that Knox County Regulation 32.1(C) is inconsistent with the fundamental requirements of the CAA. Section 113(e)(1) of the CAA requires a court to take into consideration "the duration of the violation as established by any credible evidence" in determining penalties in citizen enforcement actions. Moreover, section 114(c) of the CAA states that "[a]ny records, reports or information" obtained from sources "shall be available to the public * * * ." In accordance with these statutory mandates, the EPA promulgated its "credible evidence rule" in 1997. That rule states: "[f]or purpose of * * * establishing whether or not a person has violated or is in violation of any standard * * *, the [SIP] must not preclude the use, including the exclusive use, of any credible evidence or information, relevant to whether a source would have been in compliance with applicable requirements * * *"[143]

The EPA believes that the Knox County Regulation 32.1(C) runs afoul of these statutory and regulatory provisions. Knox County Regulation 32.1(c) explicitly bars a state official's determination that there has been a violation of a SIP emission limitation from being used as evidence in a citizen enforcement action, even though SIPs are prohibited from precluding the use of such evidence. The provision could also be interpreted to bar citizens from using evidence of a violation used by the state official in making such a determination, including reports of SSM conditions. Consequently, Knox County Regulation 32.1(C) is inconsistent with the fundamental requirements of CAA sections 113(e)(1) and 114(c) and the credible evidence rule. Moreover, by seeking to restrain the ability of private citizens to pursue enforcement actions, the provision is inconsistent with the fundamental enforcement structure created by Congress in CAA section 304. As such, the EPA believes that the Knox County Regulation 32.1(C) constitutes a substantial inadequacy in the Tennessee SIP.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Knox County Regulation 32.1(C). This provision precludes the use of a state determination that a violation has occurred from being used as evidence in a citizen enforcement action, in violation of CAA sections 113(e)(1), 114(c), and 304, and the credible evidence rule. Therefore, the EPA is proposing to find that this provision is substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to this provision in the Knox County portion of the state's SIP.

12. Tennessee: Shelby County

a. Petitioner's Analysis

The Petitioner objected to a provision in the Shelby County Code (Shelby County Code § 16–87) that addresses enforcement for excess emissions that occur during "malfunctions, startups, and shutdowns" by incorporating by reference the state's provisions in Tenn. Comp. R. & Regs. 1200–3–20.[144] Shelby County Code § 16–87 provides that "all such additions, deletions, changes and amendments as may subsequently be made" to Tennessee's regulations will automatically become part of the Shelby County Code. The Petitioner argued that once Tennessee changes its regulations, those revised provisions will be

[142] Petition at 69.

[143] 51 CFR 31.212(c); *see also* "Credible Evidence Revisions," 62 FR 8155 at 8314 (Feb. 24, 1997).

[144] Petition at 69–70.

effective in the Shelby County Code but will not be effective as part of the SIP until they are submitted to the EPA and approved.

b. The EPA's Evaluation

The EPA agrees that because Shelby County Code § 16–87 incorporates by reference provisions in the Tennessee SIP that are substantially inadequate, the Shelby County portion of the Tennessee SIP is likewise substantially inadequate to satisfy the fundamental requirements of the CAA for the same reasons.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Shelby County Code § 16–87. For the same reasons that the EPA has determined that the Tennessee SIP is substantially inadequate to meet CAA requirements, the EPA believes that the Shelby County portion of the Tennessee SIP is substantially inadequate as well. Therefore, the EPA proposes to issue a SIP call with respect to this provision in the Shelby County portion of the state's SIP.

F. Affected States in EPA Region V

1. Illinois

a. Petitioner's Analysis

The Petitioner objected to three generally applicable provisions in the Illinois SIP which together have the effect of providing discretionary exemptions from otherwise applicable SIP emission limitations, and such exemptions are impermissible under the CAA because the statute and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations.[145] [146] The Petitioner noted that the provisions invite sources to request, during the permitting process, advance permission to continue to operate during a malfunction or breakdown, and, similarly to request advance permission to "violate" otherwise applicable emission limitations during startup (Ill. Admin. Code tit. 35 § 201.261). The Illinois SIP provisions establish criteria that a state official must consider before granting the advance permission to violate the emission limitations (Ill. Admin. Code tit. 35 § 201.262). However, the Petitioner asserted, the provisions state that, once granted, the advance permission to violate the emission limitations "shall be a prima facie defense to an enforcement action" (Ill. Admin. Code tit. 35 § 201.265).

The Petitioner noted that Illinois has claimed that its SIP provisions do not provide for advance permission to violate emission limitations but that its SIP provisions instead authorize "case-by-case claims of exemption." [147] The Petitioner argued that despite this explanation, the language in the SIP is not clear and appears to grant advance permission for violations during malfunction and startup events. Furthermore, the Petitioner objected because the effect of granting that permission would be to provide the source with an absolute defense to any later enforcement action, that is, "a defense [would] attach[] at the state's discretion." The Petitioner argued that this approach would violate the fundamental requirement that all excess emissions be considered violations.

Finally, the Petitioner objected to the use of the term "prima facie defense" in Ill. Admin. Code tit. 35 § 201.265, arguing that the term is "ambiguous in its operation." The Petitioner argued that the provision is not clear regarding whether the defense is to be evaluated "in a judicial or administrative proceeding or whether the Agency determines its availability." Allowing defenses to be raised in these undefined contexts, the Petitioner argued, is "inconsistent with the enforcement structure of the Clean Air Act." The Petitioner asserted that "if * * * the "prima facie defense" is anything short of the "affirmative defense" as contemplated in the 1999 SSM Guidance, then "it clearly has the potential to interfere with EPA and citizen enforcement."

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for discretionary exemptions from otherwise applicable SIP emission limitations. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. The EPA agrees that together Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262, and Ill. Admin. Code tit. 35 § 201.265 [148] can be read to create exemptions by authorizing a state official to determine in the permitting process that the excess emissions during startup and malfunction will not be considered violations of the applicable emission limitations. The language of the SIP on its face appears to permit the state official to grant advance permission to "continue to operate during a malfunction or breakdown" or "to violate the standards or limitations * * * during startup" (Ill. Admin. Code tit. 35 § 201.261(a)).

The EPA notes that the Petitioner's characterization of Illinois's interpretation of its SIP is not accurate. While the Petitioner alleged that Illinois believed its SIP provisions to authorize "case-by-case exemptions," Illinois in fact described the effect of the permission granted under these provisions as providing the source with the:

> * * * opportunity to make a claim of malfunction/breakdown or startup, with the viability of such claim subject to specific review against the requisite requirements. Indeed, 35 IAC 201.265 clearly states that violating an applicable state standard even if consistent with any expression of authority regarding malfunction/breakdown or startup set forth in a permit shall only constitute a prima facie defense to an enforcement action for violation of said regulation.

(Ill. Envtl. Prot. Agency, Statement of Basis for a Planned Revision of the CAAPP Permit for U.S. Steel Corp. Granite City Works (March 15, 2011), at 37.) Thus, the state claimed that under its SIP provisions, any excess emissions during periods of startup or malfunction would still constitute a "violation" and that the only effect of the permission granted by the state official in the permit would be to allow a source to assert a "prima facie defense" in an enforcement action. Even in light of this explanation, the EPA agrees that the plain language of the SIP provisions do not make explicit this limitation on the

[145] The EPA notes that the Petitioner also identified several additional pollutant-specific and source category-specific provisions in the Illinois SIP that it alleged are inconsistent with the CAA and the EPA's SSM Policy. However, the Petitioner did not request that the EPA address those SIP provisions in its remedy request, and thus the EPA is not addressing those provisions in this action. The EPA may elect to evaluate those provisions in a later action.

[146] Petition at 33–36.

[147] Petition at 35 (citing Ill. Envtl. Prot. Agency, Statement of Basis for a Planned Revision of the CAAPP Permit for U.S. Steel Corp. Granite City Works [Mar. 15, 2011], at 26–27). The EPA notes that the Petitioner appears to have cited the incorrect portion of this document and that the correct citation is to pages 36–37.

[148] The EPA notes that there are a number of other provisions in the same portion of the Illinois SIP that are integral to the regulation of startups, shutdowns, and malfunctions. Those provisions include Ill. Admin. Code tit. 35 § 201.149, Ill. Admin. Code tit. 35 § 201.263, and Ill. Admin. Code tit. 35 § 201.264. The Petitioner did not object to these provisions in its Petition, but because they are part of a functional scheme in the SIP, the state may elect to revise these provisions in accordance with the EPA's proposal.

state official's authorization to grant exemptions. Indeed, by expressly granting "permission," the provisions are ambiguous and could be read as allowing the state official to be the unilateral arbiter of whether the excess emissions in a given malfunction, breakdown, or startup event constitute a violation. By deciding that an exceedance of the emission limitation was not a "violation," exercise of this discretion could preclude enforcement by the EPA or through a citizen suit. Most importantly, however, the grant of permission would authorize the state official to create an exemption from the otherwise applicable SIP emission limitation, and such an exemption is impermissible in the first instance. Such a director's discretion provision undermines the emission limitations and the emission reductions they are intended to achieve and renders them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of director's discretion provisions in Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262, and Ill. Admin. Code tit. 35 § 201.265 is thus a substantial inadequacy and renders these specific SIP provisions impermissible for this reason.

Furthermore, even if the Illinois SIP provisions cited by the Petitioner are intended to provide only an affirmative defense to enforcement, rather than as advance permission to violate the otherwise applicable SIP emission limitations, the EPA agrees that the "prima facie defense" mechanism in Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262, and Ill. Admin. Code tit. 35 § 201.265 is not an acceptable affirmative defense provision under the CAA as interpreted in the EPA's SSM Policy. Although the EPA believes that narrowly drawn affirmative defenses are permitted for malfunction events (*see* section VII.B of this notice), the EPA's interpretation of the CAA is that such affirmative defenses can only shield the source from monetary penalties and cannot be a bar to injunctive relief. An affirmative defense provision that purports to bar any enforcement action for injunctive relief for violations of emission limitations is inconsistent with the requirements of CAA sections 113 and 304. In addition, Illinois's SIP provisions allow sources to obtain a *prima facie* defense for violations that occurred during startup periods, and, as discussed in section VII.C of this notice, the EPA does not believe affirmative defenses for violations of the otherwise applicable SIP emission limitations that occur during startup or shutdown periods is permissible under the CAA.

Significantly, these Illinois SIP provisions are also deficient because, although not defined in the Illinois SIP, a *prima facie* defense typically would shift the burden of proof to the opposing party, in this case the party bringing the enforcement action against the source. The EPA's longstanding interpretation of the CAA is that an affirmative defense provision must be narrowly drawn and must require the source to establish that it has met the conditions to justify relief from monetary penalties for excess emissions in a given event. Thus, an acceptable affirmative defense under EPA's interpretation of the CAA places the burden on the source to demonstrate that it has met all the appropriate criteria before it is entitled to the defense.

Lastly, the criteria that the Illinois SIP provisions require be met before advance permission and the *prima facie* defense may be granted are not consistent with the criteria that the EPA recommends in the SSM Policy. The EPA acknowledges that the SSM Policy is only guidance concerning what types of SIP provisions could be consistent with the requirements of the CAA. Nonetheless, through this rulemaking, the EPA is proposing to determine that Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262, and Ill. Admin. Code tit. 35 § 201.265 do not include criteria that are sufficiently robust to qualify as an acceptable affirmative defense provision. The EPA believes that the inclusion of the complete bar to liability, including injunctive relief, the availability of the defense for violations during startup and shutdown, the burden-shifting effect, and the insufficiently robust qualifying criteria in Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262, and Ill. Admin. Code tit. 35 § 201.265, are substantial inadequacies and render these specific SIP provisions impermissible.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262, and Ill. Admin. Code tit. 35 § 201.265. The EPA believes that these provisions allow for exemptions from the otherwise applicable emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. In addition, Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262, and Ill. Admin. Code tit. 35 § 201.265 potentially allow for such an exemption through a state official's unilateral exercise of discretionary authority, and such provisions are inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions in sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For these reasons, the EPA is proposing to find that Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262, and Ill. Admin. Code tit. 35 § 201.265 are substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to these provisions.

The EPA is proposing to grant the Petition with respect to these provisions even though the state has stated that the effect of these provisions only provides sources with a *prima facie* defense in an enforcement proceeding. Illinois's SIP provisions do not constitute an affirmative defense provision consistent with the EPA's recommendations in the EPA's SSM Policy interpreting the CAA, for a number of reasons: it is not clear that the defense applies only to monetary penalties, which is inconsistent with the requirements of CAA sections 113 and 304; the defense applies to violations that occurred during startup periods, which is inconsistent with CAA sections 113 and 304; the provisions shift the burden of proof to the enforcing party; and finally, the provisions do not include sufficient criteria to assure that sources seeking to raise the affirmative defense have in fact been properly designed, maintained, and operated, and to assure that sources have taken all appropriate steps to minimize excess emissions. Accordingly, even if Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262, and Ill. Admin. Code tit. 35 § 201.265 are interpreted to provide a defense to enforcement rather than an exemption, the EPA is proposing to find that the provisions are substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to these provisions.

2. Indiana

a. Petitioner's Analysis

The Petitioner objected to a generally applicable provision in the Indiana SIP that allows for discretionary exemptions during malfunctions (326 Ind. Admin. Code 1–6–4(a)).[149] [150] The Petitioner

[149] The EPA notes that the Petitioner also identified several additional pollutant-specific and source category-specific provisions in the Indiana SIP that it alleged are inconsistent with the CAA and the EPA's SSM Policy. However, the Petitioner did not request that the EPA address those SIP provisions in its remedy request, and thus the EPA is not addressing those provisions in this action.

Continued

objected to the provision because it provides an exemption from the otherwise applicable SIP emission limitations, and such exemptions are impermissible under the CAA because the statute and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations. The Petitioner noted that the provision is ambiguous because it states that excess emissions during malfunction periods "shall not be considered a violation" if the source demonstrates that a number of conditions are met (326 Ind. Admin. Code 1–6–4(a)), but the provision does not specify to whom or in what forum such demonstration must be made. If made in a showing to the state, the Petitioner argued, the provision would give a state official the sole authority to determine that the excess emissions were not a violation and could thus be read to preclude enforcement by the EPA or citizens in the event that the state official elects not to treat the excess emissions as a violation. Thus, in addition to creating an impermissible exemption for the excess emissions, the Petitioner argued that the SIP's provision is also inconsistent with the CAA as interpreted in the EPA's SSM Policy because it allows the state official to make a unilateral decision that the excess emissions were not a violation and thus bar enforcement for the excess emissions by the EPA and citizens.

Alternatively, the Petitioner noted, if the demonstration was required to have been made in an enforcement context, the provision could be interpreted as providing an affirmative defense. The Petitioner argued that even if interpreted in this way, the provision is not permissible because it "appears to confuse an enforcement discretion approach with the affirmative defense approach." Furthermore, the Petitioner argued that 326 Ind. Admin. Code 1–6–4(a) is not an acceptable affirmative defense provision because it "could be interpreted to preclude EPA and citizen enforcement and shield sources from injunctive relief."

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for discretionary exemptions from otherwise applicable SIP emission limitations. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions such as 326 Ind. Admin. Code 1–6–4(a) that can be interpreted to authorize a state official to determine unilaterally that the excess emissions during malfunctions are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The EPA believes that the inclusion of a provision that allows discretionary exemptions in the SIP is thus a substantial inadequacy and renders 326 Ind. Admin. Code 1–6–4(a) impermissible.

The EPA believes that 326 Ind. Admin. Code 1–6–4(a) is also impermissible because the provision can be interpreted to make a state official the unilateral arbiter of whether the excess emissions in a given malfunction event constitute a violation. The 326 Ind. Admin. Code 1–6–4(a) provides that if a source demonstrates that four criteria are met, the excess emissions "shall not be considered a violation." Because the provision does not establish who is to evaluate whether the source has made an adequate demonstration, the provision could be read to authorize a state official to judge that violations have not occurred even though the emissions exceeded the applicable SIP emission limitations. These provisions therefore appear to vest the state official with the unilateral power to grant exemptions from otherwise applicable SIP emission limitations, without any additional public process at the state or federal level. By deciding that an exceedance of the emission limitation was not a "violation," exercise of this discretion could preclude enforcement by the EPA or through a citizen suit. Most importantly, however, the provision could be read to authorize the state official to create an exemption from the otherwise applicable SIP emission limitation, and such an exemption is impermissible in the first instance. Such a director's discretion provision undermines the emission limitations and the emissions reductions they are intended to achieve and renders them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of a director's discretion provision in 326 Ind. Admin. Code 1–6–4(a) is thus a substantial inadequacy and renders these specific SIP provisions impermissible for this reason.

The EPA believes that even if 326 Ind. Admin. Code 1–6–4(a) is interpreted to allow the source to make the required demonstration only in the context of an enforcement proceeding, the conditions set forth in the provision do not render it an acceptable affirmative defense provision. Although the EPA believes that narrowly drawn affirmative defenses are permitted under the CAA for malfunction events (*see* section VII.B of this notice), the EPA's interpretation of the CAA is that such affirmative defenses can only shield the source from monetary penalties and cannot be a bar to injunctive relief. An affirmative defense provision that purports to bar any enforcement action for injunctive relief for violations of emission limitations is inconsistent with the requirements of CAA sections 113 and 304.

Furthermore, Indiana's SIP provision is deficient because even if it were interpreted to create an affirmative defense rather than an exemption from the applicable emission limitations, it does so with conditions that are not consistent with the criteria that the EPA recommends in the SSM Policy. The EPA acknowledges that the SSM Policy is only guidance concerning what types of SIP provisions could be consistent with the requirements of the CAA. Nonetheless, through this rulemaking, the EPA is proposing to determine that 326 Ind. Admin. Code 1–6–4(a) does not include criteria that are sufficiently robust to qualify as an acceptable affirmative defense provision under the CAA. The conditions in the provision are helpful but are not consistent with all of the criteria recommended in the EPA's SSM Policy. For example, this provision does not contain criteria requiring the source to establish that the malfunction event was not foreseeable and not part of a recurring pattern indicative of inadequate design, operation, or maintenance. Indeed, the explicit limitation that the "malfunctions have not exceeded five percent (5%), as a guideline, of the normal operational time of the facility" suggests that a source could be granted exemptions for excess emissions even though it was habitually violating the applicable emission limitations over some extended period of time.

The EPA believes that the inclusion of the complete bar to liability, including injunctive relief, and the insufficiently robust qualifying criteria render 326 Ind. Admin. Code 1–6–4(a) substantially inadequate to meet CAA requirements.

Significantly, the EPA notes that the correct meaning of 326 Ind. Admin.

The EPA may elect to evaluate those provisions in a later action.

[150] Petition at 36–37.

Code 1–6–4(a) has been addressed in the past in conjunction with an interpretive letter from the state in 1984, which characterized the provision as an enforcement discretion provision applicable to state personnel rather than as a provision allowing exemptions from the emission limitations. The EPA appreciates Indiana's clarification of its reading of the provision in the 1984 letter, but at this juncture, in the course of reevaluating this provision in light of the issues raised in the Petition, the EPA believes that 326 Ind. Admin. Code 1–6–4(a) contains regulatory language that requires formal revision to eliminate significant ambiguities. For example, the provision states that: "[e]missions temporarily exceeding the standards which are due to malfunctions * * * shall not be considered a violation of the rules provided the source demonstrates" four criteria. Indiana has acknowledged that it reads these provisions not to bar enforcement by the EPA or citizens in the event that the state does not pursue enforcement, but the EPA believes that the provision is sufficiently ambiguous on this point that a revision is necessary to ensure that outcome in the event of an enforcement action.

As discussed in section VI of this notice, the EPA believes that in some instances it is appropriate to clarify provisions of a SIP submission through the use of interpretive letters. However, in some cases, there may be areas of regulatory ambiguity in a SIP provision that are significant and for which resolution is both appropriate and necessary. Because the text of 326 Ind. Admin. Code 1–6–4(a) provision is not clear on its face that it is limited to the exercise of enforcement discretion by state personnel but rather could be interpreted as a discretionary exemption from the otherwise applicable SIP emission limitations or as an inadequate affirmative defense provision, the EPA believes this SIP provision is substantially inadequate to meet CAA requirements.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to 326 Ind. Admin. Code 1–6–4(a). The EPA believes that this provision appears on its face to allow for discretionary exemptions from otherwise applicable SIP emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs in sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). This provision allows for exemptions through a state official's unilateral exercise of discretionary authority that includes no additional public process at the state or federal level, and such provisions are inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions. Moreover, the discretion created by this provision allows case-by-case exemptions from emission limitations when such exemptions are not permissible in the first instance.

Even if the EPA were to interpret 326 Ind. Admin. Code 1–6–4(a) to be an affirmative defense applicable in an enforcement context, the provision is not consistent with the EPA's recommendations in the EPA's SSM Policy interpreting the CAA. By purporting to create a bar to enforcement that applies not just to monetary penalties but also to injunctive relief, and by including criteria inconsistent with those recommended by the EPA for affirmative defense provisions, this provision is inconsistent with the requirements of CAA sections 113 and 304. For these reasons, the EPA is proposing to find that 326 Ind. Admin. Code 1–6–4(a) is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

3. Michigan

a. Petitioner's Analysis

The Petitioner objected to a generally applicable provision in Michigan's SIP that provides for an affirmative defense to monetary penalties for violations of otherwise applicable SIP emission limitations during periods of startup and shutdown.[151] The Petitioner argued that affirmative defenses for excess emissions are inconsistent with the CAA and requested that the provision be removed from Michigan's SIP. Alternatively, if such a provision were to remain in the SIP, the Petitioner asked that the SIP be amended to address two deficiencies.

First, the Petitioner objected to one of the criteria in the affirmative defense provision, Mich. Admin. Code r. 336.1916, which makes the defense available to a single source or small group of sources as long as such source did not "cause[] an exceedance of the national ambient air quality standards or any applicable prevention of significant deterioration increment." The Petitioner argued that this criterion of Michigan's affirmative defense provision is contrary to the EPA's SSM Policy because "[s]ources with *the potential* to cause an exceedance should be more strictly controlled at all times and should not be able to mire enforcement proceedings in the difficult empirical questions of whether or not the NAAQS or PSD increments were exceeded as a matter of fact" (emphasis in original).

Second, the Petitioner objected to the availability of Michigan's affirmative defense provision, Mich. Admin. Code r. 336.1916, for violations of "an applicable emission limitation," which Petitioner pointed out would include "limits derived from federally promulgated technology based standards, such as NSPSs and NESHAPs." The Petitioner argued that according to the EPA's SSM Policy, sources should not be able to seek an affirmative defense for violations of these federal technology-based standards.

b. The EPA's Evaluation

As discussed in more detail in section IV.B of this notice, the EPA does not agree with the Petitioner that affirmative defenses should never be permissible in SIPs. The EPA believes that narrowly drawn affirmative defenses can be permitted under the CAA for malfunction events, because where excess emissions are entirely beyond the control of the owner or operator of the source, it can be appropriate to provide limited relief to claims for monetary penalties (*see* section VII.B of this notice). However, as discussed in section IV.B of this notice, this basis for permitting affirmative defenses for malfunctions does not translate to planned events such as startup and shutdown. By definition, the owner or operator of a source can foresee and plan for startup and shutdown events, and therefore the EPA believes that states should be able to establish, and sources should be able to comply with, the applicable emission limitations or other controls measures during these periods of time. A source can be designed, operated, and maintained to control and to minimize emissions during such normal expected events. If sources in fact cannot meet the otherwise applicable emission limitations during planned events such as startup and shutdown, then a state may elect to develop specific alternative requirements that apply during such periods, so long as they meet other applicable CAA requirements. The EPA believes that the inclusion of an affirmative defense that applies *only* to violations that occurred during periods of startup and shutdown in Mich. Admin. Code r. 336.1916 is thus a substantial inadequacy and renders this specific SIP provision impermissible.

[151] Petition at 44–46.

The EPA does not agree with the Petitioner that affirmative defense provisions are, *per se*, impermissible for a "single source or small group of sources." The EPA believes that a SIP provision may meet the overarching statutory requirements through a demonstration by the source that the excess emissions during the SSM event did not in fact cause a violation of the NAAQS. As discussed in section VII B of this notice, the EPA considers this another means by which to assure that affirmative defense provisions are narrowly drawn to justify relief from monetary penalties for excess emissions during malfunction events. Through this alternative approach, sources also have an incentive to comply with applicable emission limitations and thereby to support the larger objective of attaining and maintaining the NAAQS.

The EPA does agree that an approvable affirmative defense provision, consistent with CAA requirements, cannot apply to any federal emission limitations approved into a SIP. Thus, if the state has elected to incorporate NSPS or NESHAP into its SIP for any purpose, such as to obtain credit for the resulting emissions reductions as part of an attainment plan, the SIP cannot have a provision that would extend any affirmative defense to sources beyond what is otherwise provided in the underlying federal regulation. To the extent that any affirmative defense is warranted during malfunctions for these technology-based standards, the federal standards contained in the EPA's regulations already specify the appropriate affirmative defense. No additional or different affirmative defense provision applicable through a SIP provision is warranted or appropriate. On its face, Mich. Admin. Code r. 336.1916 does not explicitly limit its scope to exclude federal emission limitations approved into the SIP. Thus, this would be an additional way in which the provision is substantially inadequate to meet CAA requirements.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Mich. Admin. Code r. 336.1916, which provides for an affirmative defense to violations of applicable emission limitations during startup and shutdown events. The availability of an affirmative defense for excess emissions that occur during planned events is contrary to the EPA's interpretation of the CAA to allow such affirmative defenses only for events beyond the control of the source, *i.e.*, during malfunctions. For this reason, the EPA is proposing to find that Mich. Admin. Code r. 336.1916 is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

4. Minnesota

a. Petitioner's Analysis

The Petitioner objected to a provision in the Minnesota SIP that provides automatic exemptions for excess emissions resulting from flared gas at petroleum refineries when those flares are caused by startup, shutdown, or malfunction (Minn. R. 7011.1415).[152] The provision states that: "The combustion of process upset gas in a flare, or the combustion in a flare of process gas or fuel gas which is released to the flare as a result of relief valve leakage is exempt from the standards of performance set forth in this regulation." The Petitioner noted that "process upset gas" is defined in the regulation as "any gas generated by a petroleum refinery process unit as a result of start-up, shutdown, upset, or malfunction" (Minn. R. 7011.1400(12)). The Petitioner argued that such an automatic exemption for emissions during startup, shutdown, or malfunction in a SIP provision is a violation of the fundamental requirements of the CAA and the EPA's SSM Policy that all excess emissions be considered violations, and that such an exemption interferes with enforcement by the EPA and citizens.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for automatic exemptions from otherwise applicable SIP emission limitations and requirements. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations of such limitations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, or malfunction are not violations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs.

The automatic exemption provision identified by the Petitioner explicitly states that "process upset gas," which is defined as gas generated by the affected sources as a result of start-up, shutdown, upset, or malfunction, "is exempt from the standards" (Minn. R. 7011.1415). Any exceedances of the standards during those periods would therefore not be considered a violation under this provision. With respect to the Petitioner's concern that these exemptions could interfere with enforcement by the EPA or citizens, the EPA agrees that this is one of the critical reasons why such provisions are impermissible under the CAA. By having SIP provisions that define what would otherwise be violations of the applicable emission limitations as non-violations, the state has effectively negated the ability of the EPA or the public to enforce against those violations. The EPA believes that the inclusion of such automatic exemptions from SIP requirements in Minn. R. 7011.1415 is thus a substantial inadequacy and renders this specific SIP provision impermissible.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Minn. R. 7011.1415. The EPA believes that this provision allows for automatic exemptions from the otherwise applicable SIP emission limitations and requirements, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, by creating these impermissible exemptions, the state has defined violations in a way that would interfere with effective enforcement by the EPA and citizens for excess emissions during these events as provided in CAA sections 113 and 304. For these reasons, the EPA is proposing to find that Minn. R. 7011.1415 is substantially inadequate to meet CAA requirements and thus is proposing to issue a SIP call with respect to this provision.

5. Ohio

a. Petitioner's Analysis

The Petitioner first objected to a generally applicable provision in the Ohio SIP that allows for discretionary exemptions during periods of scheduled maintenance (Ohio Admin. Code 3745–15–06(A)(3)).[153] The provision provides the state official with the authority to permit continued operation of a source during scheduled maintenance "where a complete source shutdown may result in damage to the air pollution sources or is otherwise impossible or

[152] Petition at 46–47.

[153] Petition at 60–61.

impractical." Upon application, the state official "shall authorize the shutdown of the air pollution control equipment if, in his judgment, the situation justifies continued operation of the sources." The Petitioner also objected to two source category-specific and pollutant-specific provisions that provide for discretionary exemptions during malfunctions (Ohio Admin. Code 3745–17–07(A)(3)(c) and Ohio Admin. Code 3745–17–07(B)(11)(f)).[154]

The Petitioner argued that these provisions could provide exemptions from the otherwise applicable SIP emission limitations, and such exemptions are impermissible under the CAA because the statute and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations. Moreover, the Petitioner objected to these discretionary exemptions because the state official's grant of permission to continue to operate during the period of maintenance, or to exempt sources from otherwise applicable SIP emission limitations during malfunctions, could be interpreted to excuse excess emissions during such time periods and could thus be read to preclude enforcement by the EPA or citizens in the event that the state official elects not to treat the events as violations. Thus, in addition to creating an impermissible exemption for the excess emissions, the Petitioner argued, the provisions are also inconsistent with the CAA as interpreted in the EPA's SSM Policy because they allow the state official to make a unilateral decision that the excess emissions were not a violation and thus bar enforcement for the excess emissions by the EPA and citizens.

The Petitioner also objected to a source category-specific provision in the Ohio SIP that allows for an automatic exemption from applicable emission limitations and requirements during periods of startup, shutdown, malfunction, or regularly scheduled maintenance activities (Ohio Admin. Code 3745–14–11(D)). The Petitioner objected because this provision provides an exemption from the otherwise applicable SIP requirements, and such exemptions are inconsistent with the requirements of the CAA as interpreted in the EPA's SSM Policy. The Petitioner argued that the CAA and the EPA's interpretation of the CAA in the SSM Policy require that all excess emissions be treated as violations. The Petitioner also objected to this provision because, by providing an outright exemption from otherwise applicable requirements, the state has defined these excess emissions as not violations, thereby precluding enforcement by the EPA or citizens for the excess emissions that would otherwise be violations.

Finally, the Petitioner objected to provisions that contain exemptions for Hospital/Medical/Infectious Waste Incinerator (HMIWI) sources during startup, shutdown, and malfunction (Ohio Admin. Code 3745–75–02(E), Ohio Admin. Code 3745–75–02(J), Ohio Admin. Code 3745–75–03(I), Ohio Admin. Code 3745–75–04(K), Ohio Admin. Code 3745–75–04(L)). The Petitioner requested that these exemptions be removed entirely from Ohio's SIP.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that excess emissions during startup, shutdown, malfunctions, or maintenance are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The EPA believes that the inclusion of such exemptions from the emission limitations in Ohio Admin. Code 3745–15–06(A)(3), Ohio Admin. Code 3745–17–07(A)(3)(c), Ohio Admin. Code 3745–17–07(B)(11)(f), and Ohio Admin. Code 3745–15–06(C) is thus a substantial inadequacy and renders these specific SIP provisions impermissible.

The EPA believes that Ohio Admin. Code 3745–15–06(A)(3), Ohio Admin. Code 3745–17–07(A)(3)(c), Ohio Admin. Code 3745–17–07(B)(11)(f), and Ohio Admin. Code 3745–15–06(C) are also impermissible as unbounded director's discretion provisions that make a state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation. In the case of Ohio Admin. Code 3745–15–06(A)(3), the provision authorizes the state official to allow continued operation at sources "during scheduled maintenance of air pollution control equipment." The state official's grant of permission to continue to operate during the period of maintenance could be interpreted to excuse excess emissions during that period and could thus be read to preclude enforcement by the EPA or through a citizen suit in the event that the state official elects not to treat the excess emissions as a violation. In addition, the provision vests the state official with the unilateral power to grant an exemption from the otherwise applicable SIP emission limitations, without any additional public process at the state or federal level. Although the provision does require sources to submit a report indicating the expected length of the event and estimated quantities of emissions, among other things, ultimately the state official makes his determination "if, in his judgment, the situation justifies continued operation of the sources." The state official's discretion is therefore not sufficiently bounded and extends to granting a complete exemption from applicable emission limitations that would be impermissible in the first instance.

The EPA believes that Ohio Admin. Code 3745–17–07(A)(3)(c), which exempts sources from visible particulate matter limitations during malfunctions, and Ohio Admin. Code 3745–17–07(B)(11)(f), which exempts sources from fugitive dust limitations during malfunctions, also impermissibly provide exemptions through exercise of a state official's discretion because the provisions authorize exemptions if the source has complied with Ohio Admin. Code 3745–15–06(C). The Ohio Admin. Code 3745–15–06(C) provides the state official with the discretion to "evaluate" reports of malfunctions submitted by sources and to "take appropriate action upon a determination" that sources have not adequately met the requirements of the provision. Although the Petitioner did not request that the EPA evaluate Ohio Admin. Code 3745–15–06(C), it is the regulatory mechanism by which exemptions are granted in the two provisions to which the Petitioner did object. Similar to Ohio Admin. Code 3745–15–06(A)(3), which is the director's discretion provision discussed earlier in this section of the notice, the EPA finds that Ohio Admin. Code 3745–

[154] The EPA notes that Petitioner did not categorize these provisions as discretionary exemptions, but both Ohio Admin. Code 3745–17–07(A)(3)(c) and Ohio Admin. Code 3745–17–07(B)(11)(f) provide for exemptions during malfunctions if sources have complied with Ohio Admin. Code 3745–15–06(C), which allows the director to "evaluate" malfunction reports required by the rule and to "take appropriate action upon a determination." The EPA therefore believes that the mechanism by which exemptions are granted under Ohio Admin. Code 3745–17–07(A)(3)(c) and Ohio Admin. Code 3745–17–07(B)(11)(f) is by exercise of the state director's discretion.

17–07(A)(3)(c) and Ohio Admin. Code 3745–17–07(B)(11)(f) could be interpreted to excuse excess emissions during malfunction events and could thus be read to preclude enforcement by the EPA or through a citizen suit in the event that the state official elects not to treat the excess emissions as a violation. In addition, the provision vests the state official with the unilateral power to grant an exemption from otherwise applicable SIP emission limitations, without any additional public process at the state or federal level. Although the provision does require the state official to consider the reports filed by sources before making a determination, the provision remains insufficiently bounded.

Most importantly, however, these provisions all purport to authorize the state official to create exemptions from the emission limitations, and such exemptions are impermissible in the first instance. Such director's discretion provisions undermine the emission limitations and the emissions reductions they are intended to achieve and render them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of an unbounded director's discretion provision in Ohio Admin. Code 3745–15–06(A)(3), Ohio Admin. Code 3745–17–07(A)(3)(c), Ohio Admin. Code 3745–17–07(B)(11)(f), and Ohio Admin. Code 3745–15–06(C) is thus a substantial inadequacy and renders these specific SIP provisions impermissible for this reason, in addition to the creation of impermissible exemptions.

With regard to the Petitioner's objection to the exemption for portland cement kilns from otherwise applicable requirements at Ohio Admin. Code 3745–14–11(D), the EPA agrees that the CAA does not allow for automatic exemptions from otherwise applicable SIP emission limitations and requirements. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations of such limitations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, malfunction, or maintenance are not violations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs.

The automatic exemption provision in Ohio Admin. Code 3745–14–11(D) explicitly states that the regulation's requirement that the use of control measures such as low-NOx burners during the ozone season and monitoring, reporting, and recordkeeping of ozone season NOx emissions "shall not apply" during periods of startup, shutdown, malfunction, and maintenance. The exemptions therefore provide that the excess emissions resulting from failure to run required control measures will not be violations, contrary to the requirements of the CAA. In addition, exemption from monitoring, recordkeeping, and reporting requirements during these events affects the enforceability of the emission limitation in the SIP provision. Moreover, failure to account accurately for excess emissions at sources during SSM events has a broader impact on NAAQS implementation and SIP planning, because such accounting directly informs the development of emissions inventories and emissions modeling. With respect to the Petitioner's concern that these exemptions preclude enforcement by the EPA or citizens, the EPA agrees that this is one of the critical reasons why such provisions are impermissible under the CAA. By having SIP provisions that define what would otherwise be violations of the applicable emission limitations as non-violations, the state has effectively negated the ability of the EPA or the public to enforce against those violations. The EPA believes that the inclusion of such automatic exemptions from SIP requirements in Ohio Admin. Code 3745–14–11(D) is thus substantially inadequate to meet CAA requirements.

Finally, the EPA disagrees that the provisions providing exemptions for HMIWI must be removed from the SIP. Ohio Admin. Code 3745–75–02(E), Ohio Admin. Code 3745–75–02(J), Ohio Admin. Code 3745–75–03(I), Ohio Admin. Code 3745–75–04(K), and Ohio Admin. Code 3745–75–04(L) are not approved into Ohio's SIP, but rather those rules were approved as part of the separate state plan to meet the applicable emissions guidelines under CAA § 111(d) and 40 CFR part 60. Because those rules are not in the Ohio SIP and are not related to any provisions in the SIP, they do not represent a substantial inadequacy in the SIP.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Ohio Admin. Code 3745–15–06(A)(3), Ohio Admin. Code 3745–17–07(A)(3)(c), and Ohio Admin. Code 3745–17–07(B)(11)(f). The EPA believes that these provisions allow for exemptions from the otherwise applicable SIP emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. In addition, Ohio Admin. Code 3745–15–06(A)(3), Ohio Admin. Code 3745–17–07(A)(3)(c), Ohio Admin. Code 3745–17–07(B)(11)(f), and by extension, Ohio Admin. Code 3745–15–06(C), allow for such exemptions through a state official's unilateral exercise of discretionary authority that is insufficiently bounded and includes no additional public process at the state or federal level, and such provisions are inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions. Moreover, the discretion created by these provisions allows case-by-case exemptions from emission limitations when such exemptions are not permissible in the first instance. As described in section VII.A of this notice, such provisions are inconsistent with fundamental CAA requirements for SIP revisions. For these reasons, the EPA is proposing to find that Ohio Admin. Code 3745–15–06(A)(3), Ohio Admin. Code 3745–17–07(A)(3)(c), Ohio Admin. Code 3745–17–07(B)(11)(f), and Ohio Admin. Code 3745–15–06(C) are substantially inadequate to meet CAA requirements and thus is proposing to issue a SIP call with respect to these provisions.

The EPA also proposes to grant the Petition with respect to Ohio Admin. Code 3745–14–11(D). The EPA believes that this provision allows for automatic exemptions from the otherwise applicable SIP emission limitations and requirements, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, by creating these impermissible exemptions, the state has defined violations in a way that would interfere with effective enforcement by the EPA and citizens for excess emissions during these events as provided in CAA sections 113 and 304. For these reasons, the EPA is proposing to find that this provision is substantially inadequate to meet CAA requirements and thus is proposing to issue a SIP call with respect to this provision.

The EPA proposes to deny the Petition with respect to Ohio Admin. Code 3745–75–02(E), Ohio Admin. Code 3745–75–02(J), Ohio Admin. Code 3745–75–03(I), Ohio Admin. Code

3745–75–04(K), and Ohio Admin. Code 3745–75–04(L). These provisions are not part of the Ohio SIP and thus cannot represent a substantial inadequacy in the SIP.

G. Affected States in EPA Region VI

1. Arkansas

a. Petitioner's Analysis

The Petitioner objected to two provisions in the Arkansas SIP.[155] First, the Petitioner objected to a provision that provides an automatic exemption for excess emissions of volatile organic compounds (VOC) for sources located in Pulaski County that occur due to malfunctions (Reg. 19.1004(H)). The provision states that excess emissions "which are temporary and result solely from a sudden and unavoidable breakdown, malfunction or upset of process or emission control equipment, or sudden and unavoidable upset or operation will not be considered a violation * * *." The Petitioner argued that this language is impermissible because the CAA and the EPA's interpretation of the CAA in the SSM Policy require that all excess emissions be treated as violations.

Second, the Petitioner objected to a separate provision that provides a "complete affirmative defense" for excess emissions that occur during emergency conditions (Reg. 19.602). The Petitioner argued that this provision, which the state may have modeled after the EPA's title V regulations, is impermissible because its application is not clearly limited to operating permits.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations. In accordance with CAA sections 110(a)(2)(A) and 302(k), SIPs must contain "emission limitations" and those limitations must be continuous. Thus, any excess emissions above the level of the applicable SIP emission limitation must be considered a violation of such limitation, regardless of whether the state elects to exercise its enforcement discretion. SIP provisions that create exemptions from applicable emission limitations during malfunctions or emergency conditions, however defined, are inconsistent with the fundamental requirements of the CAA.

The first provision identified by the Petitioner explicitly states that excess emissions of VOC "will not be considered a violation" of the applicable emission limitation if they occur due to an "unavoidable breakdown" or "malfunction." This exemption in Reg. 19.1004(H) is impermissible even though the state has limited the exemption to unavoidable breakdowns and malfunctions. The core problem remains that the provision provides an impermissible exemption from the otherwise applicable VOC emission limitations. In addition, by having a SIP provision that defines what would otherwise be violations of the applicable emission limitations as non-violations, the state has effectively negated the ability of the EPA or the public to enforce against those violations. The EPA believes that the inclusion of such an automatic exemption in Reg. 19.1004(H) is thus a substantial inadequacy and renders this SIP provision impermissible under the CAA.

The second provision identified by the Petitioner defines "emergency" conditions that may cause a source to exceed a technology-based emission limitation under a permit and provides a "complete affirmative defense" to an action brought for non-compliance with such limitations if certain criteria are met. The EPA believes that Reg. 19.602 is substantially inadequate for three reasons. First, the provision does not explicitly limit the affirmative defense to civil penalties. Although the EPA believes that narrowly drawn affirmative defenses are permitted under the CAA for malfunction events (*see* sections IV.B and VII.B of this notice), the EPA's interpretation of the CAA is that such affirmative defenses can only shield the source from monetary penalties and cannot be a bar to injunctive relief. An affirmative defense provision that purports to bar any enforcement action for injunctive relief for violations of emission limitations is inconsistent with the requirements of CAA sections 113 and 304. Second, the provision does not contain elements for establishing the affirmative defense consistent with all of the recommended criteria in the EPA's SSM Policy for SIP provisions. The EPA acknowledges that the SSM Policy is only guidance concerning what types of SIP provisions could be consistent with the requirements of the CAA. Nonetheless, through this rulemaking, the EPA is proposing to determine that Reg. 19.602 does not include criteria that are sufficiently robust to qualify as an acceptable affirmative defense provision. Finally, the provision can be read to provide additional defenses beyond those already provided in federal technology-based standards. The EPA believes that approvable affirmative defenses in a SIP provision cannot operate to create different or additional defenses from those that are provided in underlying federal technology-based emission limitations, such as NSPS or NESHAP. For these reasons, the EPA believes that Reg. 19.602 is substantially inadequate to meet the fundamental requirements of the CAA.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Reg. 19.1004(H) and Reg. 19.602. The EPA believes that Reg. 19.1004(H) allows for an exemption from otherwise applicable SIP emission limitations and that such exemptions are inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). Additionally, the EPA believes that Reg. 19.602 is an impermissible affirmative defense provision because it does not explicitly limit the defense to monetary penalties, establishes criteria that are inconsistent with those in the EPA's SSM Policy, and can be read to create different or additional defenses from those that are provided in underlying federal technology-based emission limitations. As a consequence, Reg. 19.602 is also inconsistent with CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For these reasons, the EPA is proposing to find that these provisions are substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to these provisions.

2. Louisiana

a. Petitioner's Analysis

The Petitioner objected to several provisions in the Louisiana SIP that allow for automatic and discretionary exemptions from SIP emission limitations during various situations, including startup, shutdown, maintenance, and malfunctions.[156] First, the Petitioner objected to provisions that provide automatic exemptions for excess emissions of VOC from wastewater tanks (LAC 33:III.2153(B)(1)(i)) and excess emissions of NOx from certain sources within the Baton Rouge Nonattainment Area (LAC 33:III.2201(C)(8)).[157] The

[155] Petition at 24. The Petitioner cites to 014–01–1 Ark. Code R. §§ 19.1004(H) and 19.602. The EPA interprets these citations as references to Reg. 19.1004(H) and Reg. 19.602 of the Arkansas Pollution Control & Ecology Commission (APC&EC), Regulation No. 19—Regulations of the Arkansas Plan of Implementation for Air Pollution Control, as approved by the EPA on Apr. 12, 2007 (72 FR 18394) (hereinafter referred to as Reg. 19.1004(H) and Reg. 19.602).

[156] Petition at 42–43.

[157] The EPA interprets the Petitioner's reference to La. Adm. Code tit. 33, § III:2153(B)(1)(i) as a

Continued

LAC 33:III.2153(B)(1)(i) provides that control devices "shall not be required" to meet emission limitations "during periods of malfunction and maintenance on the devices for periods not to exceed 336 hours per year." Similarly, LAC 33:III.2201(C)(8) provides that certain sources "are exempted" from emission limitations "during start-up and shutdown * * * or during a malfunction." The Petitioners argued that these provisions are impermissible because the CAA and the EPA's interpretation of the CAA in the SSM Policy require that all excess emissions be treated as violations.

Second, the Petitioner objected to provisions that provide discretionary exemptions to various emission limitations.[158] Three of these provisions provide discretionary exemptions from otherwise applicable SO_2 and visible emission limitations in the Louisiana SIP for excess emissions that occur during certain startup and shutdown events (LAC 33:III.1107, LAC 33:III.1507(A)(1), LAC 33:III.1507(B)(1)), while the other two provide such exemptions for excess emissions from nitric acid plants during startups and "upsets" (LAC 33:III.2307(C)(1)(a) and LAC 33:III.2307(C)(2)(a)). For example, LAC 33:III.1107, which deals with the control of emissions from flares, states that exemptions "may be granted by the administrative authority during startup and shutdown periods if the flaring was not the result of failure to maintain and repair equipment." The Petitioner argued that this language effectively allows a discretionary decision by a state official to exempt excess emissions during such events and thereby precludes enforcement by the EPA and citizens for what would otherwise be violations of the applicable SIP emission limitations, contrary to the requirements of the CAA.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions for excess emissions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with sections 110(a)(2)(A) and 302(k), SIPs must contain "emission limitations" and those limitations must be continuous. Thus, any excess emissions above the level of the applicable SIP emission limitation must be considered a violation of such limitation, regardless of whether the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, maintenance, or malfunctions are not violations of the applicable SIP emission limitations are inconsistent with the fundamental requirements of the CAA.

The first two SIP provisions identified by the Petitioner explicitly state that emission limitations for VOC and NOx are either "not required" or "exempted" during specified types of SSM events. The EPA believes that such automatic exemptions are impermissible under the CAA. By having SIP provisions that define what would otherwise be violations of the applicable SIP emission limitations as non-violations, the state has effectively negated the ability of the EPA or the public to enforce against those violations. Therefore, the EPA believes that the inclusion of such automatic exemptions in LAC 33:III.2153(B)(1)(i) and LAC 33:III.2201(C)(8) is a substantial inadequacy that renders these SIP provisions impermissible under the CAA.

The other five provisions identified by the Petitioner all provide the state with the discretion to "grant," "authorize," or "extend" exemptions from the otherwise applicable SIP emission limitations during various SSM events. The EPA believes that these provisions are impermissible as unbounded director's discretion provisions that make a state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation of otherwise applicable SIP emission limitations. More importantly, the provisions purport to authorize the state official to create exemptions from applicable SIP emission limitations when such exemptions are impermissible in the first instance. As discussed in more detail in section VII.A of this notice, these types of director's discretion provisions undermine the purpose of emission limitations and the reductions they are intended to achieve, thereby rendering them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of such a director's discretion provision in LAC 33:III.1107(A), LAC 33:III.1507(A)(1), LAC 33:III.1507(B)(1), LAC 33:III.2307(C)(1)(a), and LAC 33:III.2307(C)(2)(a) is therefore a substantial inadequacy that renders these specific SIP provisions impermissible under the CAA.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to LAC 33:III.2153(B)(1)(i) and LAC 33:III.2201(C)(8). The EPA believes that these provisions allow for exemptions from otherwise applicable emission limitations and that such exemptions are inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). The EPA also proposes to grant the Petition with respect to LAC 33:III.1107(A), LAC 33:III.1507(A)(1) & (B)(1), and LAC 33:III.2307(C)(1)(a) & (C)(2)(a). The discretion created by these provisions allows for revisions of the applicable SIP emission limitations without meeting the applicable SIP revision requirements of the CAA, and it allows case-by-case exemptions from emission limitations when such exemptions are not permissible in the first instance. Thus, these provisions are also inconsistent with CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For these reasons, the EPA is proposing to find that each of these provisions is substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to these specific provisions.

3. New Mexico

a. Petitioner's Analysis

The Petitioner objected to three provisions in the New Mexico SIP that provide affirmative defenses for excess emissions that occur during malfunctions (20.2.7.111 NMAC), during startup and shutdown (20.2.7.112 NMAC), and during emergencies 20.2.7.113 NMAC).[159] The Petitioner objected to the inclusion of these provisions in the SIP based on its view that affirmative defense provisions

citation to LAC 33:III.2153(B)(1)(i), as approved by the EPA on June 20, 2002 (67 FR 41840) (hereinafter referred to as LAC 33:III.2153(B)(1)(i)). Similarly, the EPA interprets the Petitioner's reference to La. Adm. Code tit. 33, § III:2201(C)(8) as a citation to LAC 33:III.2201(C)(8), as approved by the EPA on July 5, 2011 (76 FR 38977) (hereinafter referred to as LAC 33:III.2201(C)(8)).

[158] The EPA interprets the Petitioner's reference to La. Adm. Code tit. 33, § III:1107 as a citation to LAC 33:III.1107(A), as approved by the EPA on July 5, 2011 (76 FR 38977 (hereinafter referred to as LAC 33:III.1107(A)). Similarly, the EPA interprets the Petitioner's reference to La. Adm. Code tit. 33, § III.1507(A)(1) and (B)(1) as citations to LAC 33:III.1507(A)(1) and (B)(1), as approved by the EPA on July 15, 1993 (58 FR 38060) (hereinafter referred to as LAC 33:III.1507(A)(1) and (B)(1)). Also, the EPA interprets the Petitioner's reference to La. Adm. Code tit. 33, § III:2307(C)(1)(a) and (C)(2)(a) as a citation to LAC 33:III.2307(C)(1)(a) and (C)(2)(a), as approved by the EPA on July 5, 2011 (76 FR 38977) (hereinafter referred to as LAC 33:III.2307(C)(1)(a) and (C)(2)(a)).

[159] Petition at 54–57. The EPA interprets the Petitioner's reference to N.M. Code R. § 20.2.7.111, N.M. Code R. § 20.2.7.112, and N.M. Code R. § 20.2.7.113, as citations to 20.2.7.111 NMAC, 20.2.7.112 NMAC, and 20.2.7.113 NMAC, as approved by the EPA on Sept. 14, 2009 (74 FR 46910) (hereinafter referred to as 20.2.7.111 NMAC, 20.2.7.112 NMAC, and 20.2.7.113 NMAC).

are always inconsistent with CAA requirements. The Petitioner also argued that each of these affirmative defenses is generally available to all sources, which is in contravention of the EPA's recommendation in the SSM Policy that affirmative defenses should not be available to "a single source or groups of sources that has the potential to cause an exceedance of the NAAQS." Finally, the Petitioner argued that the affirmative defense provision applicable to emergency events is impermissible because it was modeled after the EPA's title V regulations, which are not meant to apply to SIP provisions.

b. The EPA's Evaluation

The EPA disagrees with the Petitioner's contention that no affirmative defense provisions are permissible in SIPs under the CAA. As explained in more detail in sections IV.B and VII.B of this notice, the EPA interprets the CAA to allow affirmative defense provisions for malfunctions. As long as these provisions are narrowly drawn and consistent with the CAA, as recommended in the EPA's guidance for affirmative defense provisions in SIPs, the EPA believes that states may elect to have affirmative defense provisions for malfunctions. By contrast, however, based on evaluation of the legal and factual basis for affirmative defenses in SIPs, the EPA now believes that affirmative defense provisions are not appropriate in the case of planned source actions, such as startup and shutdown, because sources should be expected to comply with applicable emission limitations during those normal planned and predicted modes of source operation. Again, as explained in sections IV.B and VII.C of this notice, the EPA is changing its interpretation of the CAA with respect to affirmative defenses applicable during startup and shutdown events. As a result, 20.2.7.112 NMAC, which provides an affirmative defense to excess emissions that occur during startup or shutdown, is substantially inadequate to meet the requirements of the CAA.

With respect to the Petitioner's second concern, the EPA agrees that the state's inclusion of an affirmative defense for malfunctions that is available to all sources, including single sources or groups of sources with the potential to cause exceedances of the NAAQS or PSD increments, renders the provision inconsistent with the CAA. As explained more fully in section VII.B of this notice, the EPA believes that such affirmative defenses may be permissible if either there is no "potential" for exceedances, or alternatively, if the provision requires that the source make an affirmative showing that any excess emissions did not in fact cause an exceedance of the NAAQS or PSD increments. The EPA has previously approved such provisions as meeting CAA requirements on a case-by-case basis in specific actions on SIP submissions. Here, however, 20.2.7.111 NMAC is not restricted in application to only those sources that do not have the potential to cause an exceedance, nor does it contain any criteria requiring an "after the fact" showing that excess emissions from a single source or group of sources did not cause an exceedance. Therefore, the provision is substantially inadequate to satisfy the CAA and EPA's interpretation of CAA requirements.

Finally, 20.2.7.113 NMAC provides an affirmative defense for excess emissions that occur during emergencies, a concept borrowed from the EPA's title V regulations. This provision defines "emergency" conditions that may cause a source to exceed a technology-based emission limitation and provides a "complete affirmative defense" to an action brought for non-compliance with such limitations if certain criteria are met. The 20.2.7.113 NMAC is substantially inadequate for three reasons. First, the provision does not explicitly limit the affirmative defense to civil penalties. Although the EPA believes that narrowly drawn affirmative defenses are permitted under the CAA for malfunction events (*see* sections IV.B and VII.B of this notice), the EPA's interpretation of the CAA is that such affirmative defenses can only shield the source from monetary penalties and cannot be a bar to injunctive relief. An affirmative defense provision that purports to bar any enforcement action for injunctive relief for violations of emission limitations is inconsistent with the requirements of CAA sections 113 and 304. Second, the provision does not contain elements for establishing the affirmative defense consistent with all of the recommended criteria in the EPA's SSM Policy for SIP provisions. The EPA acknowledges that the SSM Policy is only guidance concerning what types of SIP provisions could be consistent with the requirements of the CAA. Nonetheless, through this rulemaking, the EPA is proposing to determine that 20.2.7.113 NMAC does not include criteria that are sufficiently robust to qualify as an acceptable affirmative defense provision. Finally, the provision can be read to provide additional defenses beyond those already provided in federal technology-based standards. The EPA believes that approvable affirmative defenses in a SIP provision cannot operate to create different or additional defenses from those that are provided in underlying federal technology-based emission limitations, such as NSPS or NESHAP. For these reasons, the EPA believes that 20.2.7.113 NMAC is impermissible under the CAA.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to 20.2.7.112 NMAC, which includes an affirmative defense applicable during startup and shutdown events that is contrary to the EPA's interpretation of the CAA. The EPA believes that this provision is inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, this provision is inconsistent with the requirements of CAA sections 113 and 304. The EPA also proposes to grant the Petition with respect to 20.2.7.111 NMAC, which includes an affirmative defense applicable during malfunction events. This provision is inconsistent with the CAA because it neither limits the defense to only those sources that do not have the potential to cause exceedances of the NAAQS or PSD increments nor does it require sources to make an "after the fact" showing that no such exceedances actually occurred. Therefore, the EPA believes that this provision is similarly inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k), and with respect to CAA sections 113 and 304. Finally, the EPA proposes to grant the Petition with respect to 20.2.7.113 NMAC. The EPA believes that this provision is an impermissible affirmative defense because it does not explicitly limit the defense to monetary penalties, it establishes criteria that are inconsistent with those in EPA's SSM Policy, and it can be read to create different or additional defenses from those that are provided in underlying federal technology-based emission limitations. Thus, this provision too is inconsistent with CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k), and with respect to CAA sections 113 and 304. For these reasons, the EPA is proposing to find that these provisions are substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to these provisions.

4. Oklahoma

a. Petitioner's Analysis

The Petitioner objected to two provisions in the Oklahoma SIP that together allow for discretionary

exemptions from emission limitations during startup, shutdown, maintenance, and malfunctions (OAC 252:100–9–3(a) and OAC 252:100–9–3(b)).[160] These provisions state that excess emissions during each of these types of events constitute violations of the applicable SIP emission limitations "unless the owner or operator of the facility has complied with the notification requirements," which consist of a demonstration to the Director of the Air Quality Division that at least one of several criteria have been met. One example of the criteria includes a demonstration that the excess emissions resulted from "either malfunction or damage to the air pollution control or process equipment" or "scheduled maintenance." The Petitioner argued that these provisions empower the director to excuse violations entirely and thereby preclude enforcement by the EPA or citizens. Specifically, if an owner or operator satisfies the director that the regulatory criteria under section 3(b) have been met, then the language of section 3(a) creates an exemption for the source and strongly implies that the excess emissions are not a violation of the applicable SIP emission limitations. Therefore, the Petitioner argued that these provisions are inconsistent with the requirements of the CAA.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, even where the exemption is only available at the exercise of a state official's discretion. In accordance with sections 110(a)(2)(A) and 302(k), SIPs must contain "emission limitations" and those limitations must be continuous. Thus, any excess emissions above the level of the applicable SIP emission limitations must be considered a violation of such limitations, regardless of whether the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, malfunctions, or maintenance are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA.

The provisions identified by the Petitioner state that excess emissions during SSM events constitute violations "unless" the Director of the Air Quality Division provides an exemption. The EPA believes that OAC 252:100–9–3(a) and OAC 252:100–9–3(b) are impermissible, because they are unbounded director's discretion provisions that purport to make a state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation. The provisions authorize the state official to create exemptions from applicable SIP emission limitations on a case-by-case basis when such exemptions are impermissible in the first instance. These types of director's discretion provisions undermine the purpose of emission limitations, and the reductions they are intended to achieve, thereby rendering them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of such a director's discretion provision in OAC 252:100–9–3(a) and OAC 252:100–9–3(b) is therefore a substantial inadequacy and renders these SIP provisions impermissible.

The EPA further notes that the provision allowing exemptions for excess emissions that occur during scheduled maintenance is inconsistent with CAA requirements for the reason that maintenance is a normal mode of source operation, during which sources should be expected to meet applicable SIP emission limitations. Since the 1983 SSM Guidance, the EPA has indicated its view that excess emissions that occur during maintenance should not be excused. Similarly, in the 1999 SSM Guidance, the EPA did not recommend any affirmative defense for excess emissions that occur during maintenance. In this action, the EPA is reiterating its view that the CAA does not permit exemptions or affirmative defenses for excess emissions that occur during such planned events.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to OAC 252:100–9–3(a) and OAC 252:100–9–3(b).[161] The discretion created by these provisions allows for revisions of the applicable SIP emission limitations without meeting the applicable SIP revision requirements of the CAA, and it allows case-by-case exemptions from emission limitations when such exemptions are not permissible in the first instance. As a result, these provisions are inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). Therefore, the EPA is proposing to find that these provisions are substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to these provisions.

H. Affected States in EPA Region VII

1. Iowa

a. Petitioner's Analysis

The Petitioner first objected to a specific provision in the Iowa SIP that allows for automatic exemptions from otherwise applicable SIP emission limitations during periods of startup, shutdown, or cleaning of control equipment (Iowa Admin. Code r. 567–24.1(1)).[162] The Petitioner noted that Iowa Admin. Code r. 567–24.1(1) provides that excess emissions from these periods are not violations of the emissions standard "if the startup, shutdown or cleaning is accomplished expeditiously and in a manner consistent with good practice for minimizing emissions." The Petitioner argued that such exemptions are inconsistent with the requirements of the CAA and the EPA's SSM Policy. The Petitioner argued that the CAA and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations.

Second, the Petitioner objected to a provision that empowers the state to exercise enforcement discretion for violations of the otherwise applicable SIP emission limitations during malfunction periods (Iowa Admin. Code r. 567–24.1(4)).[163] The Petitioner noted that this provision—which states that "[d]etermination of *any* subsequent enforcement action will be made following review of [a] report" (emphasis added by Petitioner) submitted by the owner or operator of the source demonstrating certain conditions—could be interpreted to mean that "no enforcement is warranted at all, by anyone."[164] The Petitioner argued that such an interpretation of this provision could preclude enforcement by the EPA or citizens, both for civil penalties and injunctive relief, and that the EPA's interpretation of the CAA would forbid such a provision. The Petitioner thus requested that Iowa revise this provision to eliminate any confusion that a decision by Iowa state personnel not to enforce against a violation would in any way

[160] Petition at 61–63. The EPA interprets the Petitioner's reference to Okla. Admin. Code § 252:100–9–3(a) and Okla. Admin. Code § 252:100–9–3(b) as citations to OAC 252:100–9–3(a) and OAC 252:100–9–3(b), as approved by the EPA on Nov. 3, 1999 (64 FR 59629) (hereinafter referred to as OAC 252:100–9–3(a) and (3)(b)).

[161] The EPA notes that on July 16, 2010, Oklahoma submitted a SIP revision that would remove OAC 252:100–9–3(a) and OAC 252:100–9–3(b) and replace them with affirmative defense provisions. In this action, the EPA is only evaluating these provisions as they are currently found in the EPA-approved Oklahoma SIP. The EPA is not evaluating the July 16, 2010 SIP revision as part of this action. The EPA will address the July 16, 2010 SIP revision in a later action.

[162] Petition at 37–38.

[163] Petition at 37–38.

[164] Petition at 38.

foreclose enforcement by the EPA or citizens.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that excess emissions during startup, shutdown, or control equipment cleaning are not violations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The first provision identified by the Petitioner explicitly states that excess emission during periods of startup, shutdown, and cleaning of control equipment "is not a violation," contrary to the requirements of the CAA. The EPA believes that the inclusion of such an exemption from otherwise applicable SIP emission limitations in Iowa Admin. Code r. 567–24.1(1) is thus a substantial inadequacy and renders this specific SIP provision impermissible.

The EPA notes that these exemptions are impermissible even though the state has imposed some factual limitations on their potential scope. In Iowa Admin. Code r. 567–24.1(1), the state has conditioned the exemption for excess emissions during periods of startup, shutdown, or cleaning of control equipment, requiring that such activities be "accomplished expeditiously and in a manner consistent with good practice for minimizing emissions." Although this limitation on the scope of the exemptions is a helpful feature, the core problem remains that the provision provides impermissible exemptions from the otherwise applicable SIP emission limitations by defining the excess emission as "not a violation." Such provisions are impermissible under the CAA because the state has effectively negated the ability of the EPA or through a citizen suit to enforce against those violations.

However, the EPA disagrees with Petitioner that Iowa Admin. Code r. 567–24.1(4) is impermissible under the CAA. The EPA believes that this provision is permissible because it defines parameters for the exercise of enforcement discretion by state personnel for violations of emission limitations during malfunctions. According to the EPA's SSM Policy interpreting the CAA, as discussed in section IX.A of this notice, a state has authority to have a SIP provision that pertains to the exercise of enforcement discretion concerning actions taken by state personnel. The provision at issue clearly states that any excess emission during malfunction "is a violation." The rule also delineates factors that will be considered by state personnel in determining whether to pursue enforcement for those regulatory violations that are due to excess emissions during malfunctions. The listing of these factors does not alter the statement that excess emissions are violations under the Iowa regulations. The provisions that describe the factors to be considered by state personnel only require that the state personnel consider such factors. The regulations do not state or imply that if a source makes an appropriate showing of meeting the factors, it is exempt from penalties or injunctive relief. The provision does not state or imply that any other entity, including the EPA or a member of the public, is precluded from taking an enforcement action if the state exercises its discretion not to enforce violations of the emission limitations during malfunctions. Iowa Admin. Code r. 567–24.1(4) expressly identifies excess emissions described in the rule as violations and allows for the exercise of enforcement discretion in addressing malfunctions. This is consistent with the CAA and the EPA's SSM Policy and therefore does not render the SIP provision substantially inadequate.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Iowa Admin. Code. R. 567–24.1(1). The EPA believes that this provision allows for exemptions from the otherwise applicable SIP emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For this reason, the EPA is proposing to find that Iowa Admin. Code. R. 567–24.1(1) is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

The EPA proposes to deny the Petition with respect to Iowa Admin. Code r. 567–24.1(4). The EPA believes that the provision is on its face clearly applicable only to Iowa state enforcement personnel and that the provision could not reasonably be read by a court to foreclose enforcement by the EPA or through a citizen suit where Iowa state personnel elect to exercise enforcement discretion. The EPA solicits comments on this issue, in particular from the State of Iowa, to assure that there is no misunderstanding with respect to the correct interpretation of Iowa Admin. Code r. 567–24.1(4).

2. Kansas

a. Petitioner's Analysis

The Petitioner objected to three provisions in the Kansas SIP that allow for exemptions for excess emissions during malfunctions and necessary repairs (K.A.R. § 28–19–11(A)), scheduled maintenance (K.A.R. § 28–19–11(B)), and certain routine modes of operation (K.A.R. § 28–19–11(C)).[165] The Petitioner objected because all three of these provisions "state that excess emissions are not violations (or are permitted)," [166] contrary to the fundamental requirement of the CAA that all excess emissions be considered violations. The Petitioner argued that all three of these provisions would thus appear impermissibly to preclude enforcement by the EPA or citizens for the excess emissions that would otherwise be violations.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during malfunctions, necessary repairs, and routine modes of operation are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. Two of the provisions identified by the Petitioner explicitly state that excess emissions under certain circumstances will "not be deemed violations," which is contrary to the requirements of the CAA. The EPA believes that the inclusion of such exemptions from the

[165] Petition at 38–39.

[166] Petition at 39.

emission limitations in K.A.R. § 28–19–11(A) and the first part of K.A.R. § 28–19–11(C) is thus a substantial inadequacy and renders these specific SIP provisions impermissible.

The EPA notes that these exemptions are impermissible even though the state has imposed some factual and temporal limitations on their potential scope. For example, in K.A.R. § 28–19–11(A), the state has specified that excess emissions during malfunctions or necessary repairs "shall not be deemed violations provided that: (1) The person responsible * * * notifies the department of the occurrence and nature of such malfunctions, breakdowns, or repairs, in writing, within ten (10) days of noted occurrence." Similarly, in the first part of K.A.R. § 28–19–11(C) with respect to "[e]xcessive contaminant emission from fuel burning equipment used for indirect heating purposes resulting from fuel or load changes, start up, soot blowing, cleaning of fires, and rapping of precipitators," the state has made the exemption available only in such events that "do not exceed a period or periods aggregating more than five (5) minutes during any consecutive one (1) hour period." Although these extra limitations on the scope of the exemptions are helpful features, the core problem remains that both of the provisions provide impermissible exemptions from the emission limitations by defining the excess emissions as non-violations.

The EPA believes that both K.A.R. § 28–19–11(B) and the second part of K.A.R. § 28–19–11(C) are impermissible as unbounded director's discretion provisions that purport to make a state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation. In the case of K.A.R. § 28–19–11(B), the provision authorizes a state official unilaterally to grant "prior approval" to permit "[e]missions in excess of the limitations specified in these emission control regulations resulting from scheduled maintenance of control equipment and appurtenances." The provision vests the state official with unilateral power to grant an exemption from the otherwise applicable emission limitation, without any public process at the state or federal level. By deciding that an exceedance of the emission limitation is "permitted," exercise of this discretion could preclude enforcement by the EPA or through a citizen suit. K.A.R. § 28–19–11(B) does contain a requirement that the source establish that it was not possible for the scheduled maintenance to occur during periods of shutdown but nevertheless empowers the state official to create an exemption from the emission limitation, and such an exemption is impermissible in the first instance. Such a director's discretion provision undermines the emission limitations in the SIP, and the emissions reductions they are intended to achieve, and renders them less enforceable by the EPA or through a citizen suit.

Similarly, the EPA believes that the second part of K.A.R. § 28–19–11(C) is impermissible because it allows a state official unilaterally to "authorize, upon request of the operator, an adjusted time schedule for permitting * * * excessive emissions" if the source can demonstrate that the period of "fuel or load changes, start up, soot blowing, cleaning of fires, and rapping of precipitators" is required to extend longer than the five minutes during a consecutive one-hour period allowed by the first part of K.A.R. § 28–19–11(C). Because the K.A.R. § 28–19–11(C) grant of an automatic exemption of excess emissions during these events is impermissible in the first instance, the provision's authorization of the state official to extend the period of exemption for an even longer period upon request from a source is also impermissible. Moreover, the provision permits the state official to extend the time period of exemption without any additional public process at the state or federal level. This discretion authorizes the creation of an extended exemption on a case-by-case basis, where the exemption is not permissible in the first instance. Thus, this provision undermines the SIP emission limitations, and the emissions reductions they are intended to achieve, and renders them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of director's discretion provisions in K.A.R. § 28–19–11(B) and K.A.R. § 28–19–11(C) is thus a substantial inadequacy and renders these specific SIP provisions impermissible for this reason.

The EPA notes that K.A.R. § 28–19–11(C) does condition the state official's authorization of an extended time period in which excess emissions are not considered violations upon a source limiting "visible emissions" to not exceed 60 percent opacity. The CAA does, as discussed in section VII.A of this notice, permit states to develop alternative emission limitations or other forms of enforceable control measures or techniques that apply during startup or shutdown. The EPA believes that emission limitations in SIPs should generally be developed in the first instance to account for the types of normal operation outlined in K.A.R. § 28–19–11(C), such as cleaning and soot blowing. K.A.R. § 28–19–11(C) does not appear to comply with the Act's requirements as interpreted in the EPA's SSM Policy in a number of respects. The provision's exemptions apply to all SIP emission limitations, and the alternative limitation in K.A.R. § 28–19–11(C) restricts only visible emissions and thus, at best, is an alternative emission limitation only for particulate matter. In addition, such alternative emission limitations must be developed in consultation with the EPA and must be narrowly drawn to apply to small groups of sources using specific types of control strategy. To the extent that the requirement limiting the opacity of visible emissions during periods of fuel or load changes, start up, soot blowing, cleaning of fires, and rapping of precipitators in K.A.R. § 28–19–11(C) was intended to function as an alternative emission limitation rather than as an exemption granted at the state official's discretion from the otherwise applicable SIP emission limitations, the terms of the alternative limitation are substantially inadequate and do not render this specific SIP provision permissible under the CAA.

With respect to the Petitioner's concern that the challenged exemptions preclude enforcement by the EPA or citizens, the EPA agrees that this is one of the critical reasons why such provisions are impermissible under the CAA. By having SIP provisions that automatically exempt or allow state officials to define what would otherwise be violations of the applicable SIP emission limitations as non-violations, the state has effectively negated the ability of the EPA or the public to enforce against those violations.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to K.A.R. § 28–19–11(A) and the first part of K.A.R. § 28–19–11(C). The EPA believes that both of these provisions allow for automatic exemptions from the otherwise applicable emission limitations, and that such outright exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, by creating these impermissible exemptions, the state has defined violations in a way that would interfere with effective enforcement by the EPA and citizens for excess emissions during these events as provided in CAA sections 113 and 304.

The EPA also proposes to grant the Petition with respect to K.A.R. § 28–19–11(B) and the second part of K.A.R.

§ 28–19–11(C). The EPA believes both allow for exemptions from otherwise applicable emission limitations through a state official's unilateral exercise of discretionary authority that is insufficiently bounded and includes no additional public process at the state or federal level. Such provisions are inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions. Moreover, the requirement that visible emissions not exceed 60-percent opacity during the periods of operation specified in K.A.R. § 28–19–11(C) is not a permissible alternative emission limitation under the EPA's SSM Policy interpreting the CAA.

For these reasons, the EPA is proposing to find that K.A.R. § 28–19–11(A), K.A.R. § 28–19–11(B), and K.A.R. § 28–19–11(C) are substantially inadequate to meet CAA requirements and thus is proposing to issue a SIP call with respect to these provisions.

3. Missouri

a. Petitioner's Analysis

The Petitioner objected to two provisions in the Missouri SIP that could be interpreted to provide discretionary exemptions.[167] [168] The first provides exemptions for visible emissions exceeding otherwise applicable SIP opacity limitations (Mo. Code Regs. Ann. tit 10, § 10–6.220(3)(C)). The second provides authorization to state personnel to decide whether excess emissions "warrant enforcement action" where a source submits information to the state showing that such emissions were "the consequence of a malfunction, start-up or shutdown." (Mo. Code Regs. Ann. tit 10, § 10–6.050(3)(C)). The Petitioner argued that Mo. Code Regs. Ann. tit 10, § 10–6.050(3)(C) "clearly gives the director the authority to decide whether excess emissions occurred during a malfunction, start-up, or shutdown, and whether they 'warrant enforcement action.' " [169] According to the Petitioner, the provision could be interpreted to decide that enforcement is not warranted by anybody, which could preclude action by the EPA and citizens for both civil penalties and injunctive relief, and such an interpretation is inconsistent with the CAA and the EPA's SSM policy interpreting the CAA. Similarly, the Petitioner argued that Mo. Code Regs. Ann. tit 10, § 10–6.220(3)(C) could be construed to empower the director to preclude enforcement by the EPA and citizens. The Petitioner noted that the CAA and the EPA's SSM policy forbid such provisions if they would purport to preclude enforcement by the EPA or citizens.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitations must be considered violations, whether or not the state elects to exercise its enforcement discretion.

The EPA believes that Mo. Code Regs. Ann. tit 10, § 10–6.220(3)(C) is impermissible as an insufficiently bounded director's discretion provision. The provision states that "[v]isible emissions over the limitations * * * of this rule are in violation of this rule unless the director determines that the excess emissions do not warrant enforcement action based on data submitted" by sources regarding startup, shutdown, and malfunction events. This provision could be read to mean that once the state official has determined that excess visible emissions do not warrant enforcement action, those excess emissions are not violations. Such an interpretation would make the state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation, which could preclude enforcement by the EPA or the public who might disagree about whether enforcement action is warranted. Most importantly, however, the provision may be read to authorize the state official to create an exemption from the emission limitation, and such an exemption is impermissible in the first instance. The EPA believes that the inclusion of an insufficiently bounded director's discretion provision in Mo. Code Regs. Ann. tit 10, § 10–6.220(3)(C) is thus a substantial inadequacy and renders this specific SIP provision impermissible for this reason.

The EPA believes that Mo. Code Regs. Ann. tit 10, § 10–6.050(3)(C) is permissible because it defines parameters for the exercise of enforcement discretion by state personnel for violations of emission limitations. According to the EPA's SSM Policy, as discussed in section IX.A of this notice, a state has authority to have a SIP provision that pertains to the exercise of enforcement discretion concerning actions taken by state personnel. The provision only maintains that state enforcement personnel "shall consider" certain factors in determining whether to take an enforcement action under the state statutory enforcement provisions. The regulations do not state or imply that if a source makes an appropriate showing it is exempt from penalties or injunctive relief. The provisions that describe the factors to be considered by a state official only state that the official will consider such factors. The provision does not state or imply that any other entity, including the EPA or a member of the public, is precluded from taking an enforcement action if the state exercises its discretion not to pursue enforcement. The EPA believes that Mo. Code Regs. Ann. tit 10, § 10–6.050(3)(C) is consistent with the CAA and the EPA's SSM Policy and therefore does not render the SIP provision substantially inadequate.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Mo. Code Regs. Ann. tit 10, § 10–6.220(3)(C). The EPA believes that this provision could be read to allow for exemptions from the otherwise applicable SIP emission limitations through a state official's unilateral exercise of discretionary authority that is insufficiently bounded and includes no additional public process at the state or federal level. Such a provision is inconsistent with the fundamental requirements of the CAA with respect to SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For these reasons, the EPA is proposing to find Mo. Code Regs. Ann. tit 10, § 10–6.220(3)(C) is substantially inadequate to meet CAA requirements and thus is proposing to issue a SIP call with respect to this provision.

[167] Petition at 49–50.

[168] The EPA notes that the Petitioner also identified additional provisions Mo. Code Regs. Ann. tit 10, § 10–6.200(3)(E)(1), Mo. Code Regs. Ann. tit 10, § 10–6.200(3)(E)(3)(C)(I), Mo. Code Regs. Ann. tit 10, § 10–6.200(3)(E)(4)(B), Mo. Code Regs. Ann. tit 10, § 10–6.200(3)(E)(5)(E), Mo. Code Regs. Ann. tit 10, § 10–6.200(3)(E)(6)(F), Mo. Code Regs. Ann. tit 10, § 10–6.200(3)(E)(7)(E), Mo. Code Regs. Ann. tit 10, § 10–6.200(3)(E)(11)(C), which provide for exemptions to HMIWIs, that it alleged are inconsistent with the CAA and the EPA's SSM Policy. However, the Petitioner did not request that the EPA address these provisions in its remedy request, and thus the EPA is not addressing these provisions in this action. (This is in contrast to the case of a similar HMIWI provision in Nebraska for which the Petition did specifically make such a request.) The EPA further notes that the provisions enumerated above are not part of Missouri's SIP but were approved as part of the separate state plan to meet the applicable emissions guidelines under CAA § 111(d) and 40 CFR Part 60. Therefore, a SIP call is not appropriate. The EPA may elect to evaluate these provisions in a later action.

[169] Petition at 50.

The EPA proposes to deny the Petition with respect to Mo. Code Regs. Ann. tit 10, § 10–6.050(3)(C). The EPA believes that the provision is on its face clearly applicable only to Missouri state enforcement personnel and that the provision could not reasonably be read by a court to foreclose enforcement by the EPA or through a citizen suit where Missouri state personnel elect to exercise enforcement discretion. The EPA solicits comments on this issue, in particular from the State of Missouri, to assure that there is no misunderstanding with respect to the correct interpretation of Mo. Code Regs. Ann. tit 10, § 10–6.050(3)(C).

4. Nebraska

a. Petitioner's Analysis

The Petitioner objected to two provisions in the Nebraska SIP.[170] First, the Petitioner objected to a generally applicable provision that provides authorization to state personnel to decide whether excess emissions "warrant enforcement action" where a source submits information to the state showing that such emissions were "the result of a malfunction, start-up or shutdown" (Neb. Admin. Code Title 129 § 11–35.001). The Petitioner argued that this provision "clearly gives the Director the authority to decide whether excess emission occurred during a malfunction, startup or shutdown, and whether they 'warrant enforcement action.'" [171] According to the Petitioner, the provision could be interpreted to give a state official the authority to decide that enforcement is not warranted by anybody, which could preclude action by the EPA and citizens for both civil penalties and injunctive relief, and such an interpretation is inconsistent with the CAA and the EPA's SSM policy interpreting the CAA. The Petitioner thus requested that Nebraska revise the provision to eliminate any confusion that a decision by state personnel not to enforce against a violation would in any way foreclose enforcement by the EPA or citizens.

Second, the Petitioner objected to a specific provision in Nebraska state law that contains exemptions for excess emissions at HMIWI during startup, shutdown, and malfunction (Neb. Admin. Code Title 129 § 18–004.02). The Petitioner requested that these exemptions be removed entirely from Nebraska's SIP.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitations must be considered violations, whether or not the state elects to exercise its enforcement discretion.

The EPA believes that Neb. Admin. Code Title 129 § 11–35.001 is permissible because it defines parameters for the exercise of enforcement discretion by state personnel for violations of emission limitations. According to the EPA's SSM Policy, as discussed in section IX.A of this notice, a state has authority to have a SIP provision that pertains to the exercise enforcement discretion concerning actions taken by state personnel. The provision in question maintains that state enforcement personnel "shall consider" certain factors in determining whether to take an enforcement action under the state statutory enforcement provisions. The regulation does not expressly or implicitly place any limits on the state personnel's ability to exercise discretion, and the enforcement discretion provided by this regulation is not an exemption to the SIP emission limitations. The provision does not state or imply that any other entity, including the EPA or a member of the public, is precluded from taking enforcement action if the state exercises its discretion not to pursue enforcement. The EPA believes that Neb. Admin. Code Title 129 § 11–35.001 is consistent with the CAA and the EPA's SSM Policy and therefore does not render the SIP substantially inadequate.

The EPA disagrees that the provisions providing exemptions for HMIWI must be removed from the SIP. Nebraska Admin. Code Title 129 § 18–004.02 was not approved into Nebraska's SIP, but rather it was approved as part of the separate state plan to meet the applicable emissions guidelines under CAA § 111(d) and 40 CFR Part 60. Because that rule is not in the Nebraska SIP is not related to any provisions in the SIP, it does not represent an inadequacy in the SIP.

c. The EPA's Proposal

The EPA proposes to deny the Petition with respect to Neb. Admin. Code Title 129 § 11–35.001. The EPA believes that this provision is on its face clearly applicable only to Nebraska state enforcement personnel and that the provision could not reasonably be read by a court to foreclose enforcement by the EPA or through a citizen suit where personnel from Nebraska elect to exercise enforcement discretion. The EPA solicits comments on this issue, in particular from the State of Nebraska, to assure that there is no misunderstanding with respect to the correct interpretation of this provision.

The EPA proposes to deny the Petition with respect to Neb. Admin. Code Title 129 § 18–004.02. This regulation is not part of the Nebraska SIP and thus cannot represent an inadequacy in the SIP.

5. Nebraska: Lincoln-Lancaster

a. Petitioner's Analysis

The Petitioner objected to a generally applicable provision in the Lincoln-Lancaster County Air Pollution Control Program (Art. 2 § 35), which governs the Lincoln-Lancaster County Air Pollution Control District of Nebraska, that is parallel "in all aspects pertinent to this analysis" to Neb. Admin. Code Title 129 § 11–35.001.[172] The Lincoln-Lancaster County provision provides authorization to local personnel to decide whether excess emissions 'warrant enforcement action" where a source submits information to the county showing that such emissions were "the result of a malfunction, start-up or shutdown." The Petitioner argued that this provision "clearly gives the Director the authority to decide whether excess emission occurred during a malfunction, startup or shutdown, and whether they 'warrant enforcement action.'" [173] According to the Petitioner, the provision could be interpreted to decide that enforcement is not warranted by anybody, which could preclude action by the EPA and citizens for both civil penalties and injunctive relief, and such an interpretation is inconsistent with the CAA and the EPA's SSM Policy interpreting the CAA. The Petitioner thus requested that Nebraska or Lincoln-Lancaster County revise the provision to eliminate any confusion that a decision by local personnel not to enforce against a violation would in any way foreclose enforcement by the EPA or citizens.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In

[170] Petition at 51.

[171] Petition at 51.

[172] Petition at 51–52.

[173] Petition at 52.

accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitations must be considered violations, whether or not the state elects to exercise its enforcement discretion.

The EPA believes that Lincoln-Lancaster County Air Pollution Control Program, Art. 2 § 35 is permissible because it defines parameters for the exercise of enforcement discretion by local personnel for violations of emission limitations. According to the EPA's SSM Policy, as discussed in section IX.A of this notice, a state has authority to have a SIP provision that pertains to the exercise enforcement discretion concerning actions taken by state personnel. The provision in question maintains that local enforcement personnel "shall consider" certain factors in determining whether to take an enforcement action under the local statutory enforcement provisions. The regulation does not expressly or implicitly place any limits on the local personnel's ability to exercise discretion, and the enforcement discretion provided by the regulation is not an exemption to the SIP emission limitations. The provision does not state or imply that any other entity, including the EPA or a member of the public, is precluded from taking enforcement action if the county exercises its discretion not to pursue enforcement. The EPA believes that Lincoln-Lancaster County Air Pollution Control Program, Art. 2 § 35 is consistent with the CAA and EPA's SSM Policy and therefore does not render the SIP substantially inadequate.

c. The EPA's Proposal

The EPA proposes to deny the Petition with respect to Lincoln-Lancaster County Air Pollution Control Program, Art. 2 § 35. The EPA believes that this provision is on its face clearly applicable only to Lincoln-Lancaster County enforcement personnel and that the provision could not reasonably be read by a court to foreclose enforcement by the EPA or through a citizen suit where personnel from Lincoln-Lancaster County elect to exercise enforcement discretion. The EPA solicits comments on this issue, in particular from the State of Nebraska and from the Lincoln-Lancaster County Air Pollution Control Program, to assure that there is no misunderstanding with respect to the correct interpretation of this provision.

I. Affected States in EPA Region VIII

1. Colorado

a. Petitioner's Analysis

The Petitioner objected to two affirmative defense provisions in the Colorado SIP that provide for affirmative defenses to qualifying sources during malfunctions (5 Colo. Code Regs § 1001–2(II.E)) and during periods of startup and shutdown (5 Colo. Code Regs § 1001–2(II.J)).[174] The Petitioner acknowledged that this state has correctly revised its SIP in important ways in order to be consistent with CAA requirements, as interpreted in the EPA's SSM Policy, including providing affirmative defense provisions that are limited to monetary penalties, that do not apply in actions to enforce federal standards such as NSPS or NESHAP approved into the SIP, and that meet "almost word for word" the recommendations of the 1999 SSM Guidance. Nevertheless, the Petitioner had two concerns with these SIP provisions.

First, the Petitioner objected to both of these provisions based on its assertion that the CAA allows no affirmative defense provisions in SIPs. Second, the Petitioner asserted that even if affirmative defense provisions were permissible under the CAA, the state had properly followed EPA guidance in the affirmative defense provision applicable to startup and shutdown events but failed to do so in the affirmative defense provision applicable to malfunctions. Specifically, the Petitioner argued that the EPA's own guidance for affirmative defenses recommended that they "are not appropriate where a single source or a small group of sources has the potential to cause an exceedance of the NAAQS or PSD increments."[175] Instead, the state's affirmative defense for malfunction events is potentially available to any source, if it can establish that the excess emissions during the event did not result in exceedances of ambient air quality standards that could be attributed to the source.[176] The Petitioner objected to this as not merely inconsistent with the EPA's 1999 SSM Guidance but an approach "that does not have the same deterrent effect" on sources and that would not have the same effects on sources to assure that they comply at all times in order to avoid violations. As a practical matter, the Petitioner also argued that including this element to the affirmative defense could "mire enforcement proceedings in the question of whether or not the NAAQS or PSD increments were exceeded as a matter of fact."

b. The EPA's Evaluation

The EPA disagrees with the Petitioner's contention that no affirmative defense provisions are permissible in SIPs under the CAA. As explained in more detail in section IV.B of this notice, the EPA interprets the CAA to allow affirmative defense provisions for malfunctions. So long as these provisions are narrowly drawn and consistent with the CAA, as recommended in the EPA's guidance for affirmative defense provisions in SIPs, the EPA believes that states may elect to have affirmative defense provisions for malfunctions. However, based on evaluation of the legal and factual basis for affirmative defenses in SIPs, the EPA now believes that affirmative defense provisions are not appropriate in the case of planned source actions, such as startup and shutdown, because sources should be expected to comply with applicable emission limitations during those normal planned and predicted modes of source operation. Again, as explained in section IV.B of this notice, the EPA is changing its interpretation with respect to affirmative defenses for startup and shutdown. The EPA acknowledges that at the time of its approval of 5 Colo. Code Regs § 1001–2(II.J) into the SIP in 2006, the state had complied with the EPA's then-applicable interpretation of the CAA and had worked with the EPA to develop that provision.[177] However, based on further consideration of this issue prompted by the Petition, the EPA is revising its SSM Policy to interpret the CAA to allow affirmative defenses only in the case of events that are beyond the control of the source, *i.e.*, malfunctions.

With respect to the Petitioner's second concern, the EPA disagrees that the state's inclusion of an affirmative defense available to all sources, including single sources or groups of sources with the "potential" to cause exceedances of the NAAQS or PSD increments, renders the provision inconsistent with the CAA. The EPA's recommendations for appropriate criteria for affirmative defenses in the SSM Policy are guidance, and as guidance, the EPA believes that there can be facts and circumstances in which a state may elect to develop a SIP

[174] Petition at 25–27.

[175] *Id.* at 25.

[176] *See*, 5 Colo. Code Regs § 1001–2(II.E.1.j).

[177] *See*, "Approval and Disapproval and Promulgation of Colorado Affirmative Defense Provisions for Startup and Shutdown," 71 FR 8958 (Feb. 22, 2006).

provision with somewhat different criteria, so long as they still meet the same statutory objectives. Conditioning the affirmative defense on a factual showing that there was no actual violation of air standards attributable to the excess emissions during the malfunction is an acceptable alternative means to the same end. For example, instead of providing no affirmative defense to sources with this "potential" for these impacts on air quality, the state could provide the affirmative defense to sources on the condition that the source must be able to demonstrate that the excess emissions did not have these impacts. The EPA considers this an appropriate means to the same end of providing the affirmative defense to sources in a way that provides relief from monetary penalties for events that were beyond their control, at the same time providing incentive to the source to prevent the violation and to take all practicable steps to minimize the impacts of the violation in order to qualify for the relief from penalties. As described in more detail in section VII.B of this notice, the EPA is revising its recommendations for affirmative defense provisions for malfunctions with respect to this specific point in this proposal.

Finally, the EPA understands the Petitioner's concern about enforcement proceedings becoming "mired" in various questions of fact that must be established in an enforcement action. However, the EPA notes that all enforcement proceedings turn upon important questions of fact that must be proven, including facts necessary to establish whether there was a violation, the extent of the violation, and whether there are extenuating circumstances that should be taken into consideration in the assessment of monetary penalties or injunctive relief for the violation. Indeed, the statutory factors that Congress provided for the assessment of penalties in CAA section 113(e) explicitly include "the seriousness of the violation," which would encompass the extent and severity of the environmental impact of the violation. Thus, the EPA does not agree that it is unreasonable to include an affirmative defense element that pertains to whether or not the excess emissions in question caused a violation of the NAAQS or PSD increments.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to 5 Colo. Code Regs § 1001–2(II.J) because it provides an affirmative defense for violations due to excess emissions applicable during startup and shutdown events, contrary to the EPA's current interpretation of the CAA. The EPA believes that this provision allows for an affirmative defense that is inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, this provision is inconsistent with the requirements of CAA sections 113 and 304. For these reasons, the EPA is proposing to find that this provision is substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to this provision.

The EPA proposes to deny the Petition with respect to 5 Colo. Code Regs § 1001–2(II.E), because this provision includes an affirmative defense applicable to malfunction events that is consistent with the requirements of the CAA, as interpreted by the EPA in the SSM Policy. In particular, the EPA denies the Petition with respect to the claim that this provision is inconsistent with the CAA because it is available to sources or groups of sources that might have the potential to cause violations of the NAAQS or PSD increments. The EPA believes that an acceptable alternative approach is to require the source to establish, as an element of the affirmative defense, that the excess emissions in question did not cause such impacts. Accordingly, the EPA is proposing to find that this provision is consistent with CAA requirements and thus declining to make a finding of substantial inadequacy with respect to this provision.

2. Montana

a. Petitioner's Analysis

The Petitioner objected to an exemption from otherwise applicable emission limitations for aluminum plants during startup and shutdown (Montana Admin. R 17.8.334).[178] The Petitioner argued that an automatic exemption for emissions during startup and shutdown events is inconsistent with the CAA and the EPA's interpretation of the CAA in the SSM Policy. In addition, the Petitioner argued that these exemptions also could not qualify as source-specific alternative limits applicable during startup and shutdown because there "is nothing to indicate that the State addressed the feasibility of control strategies, minimization of the frequency and duration of startup and shutdown modes, worst-case emissions, and impacts on air quality."[179] The Petitioner further objected that this provision would be in contravention of the EPA's recommendation that source-specific emission limitations for startup and shutdown would not be appropriate when a single source or small group of sources has the potential to cause an exceedance of the NAAQS or PSD increments.

b. The EPA's Evaluation

The EPA agrees that ARM 17.8.334 (in Administrative Rule of Montana) is inconsistent with the requirements of the CAA. This provision explicitly provides that affected sources are exempted from otherwise applicable SIP emission limitations during startup and shutdown. The relevant part of this SIP provision specifies that "[o]perations during startup and shutdown shall not constitute representative conditions for the purposes of determining compliance with this rule" and further specifies "nor shall emission in excess of the levels required in ARM 17.8.331 and 17.8.332 during periods of startup and shutdown be considered a violation of ARM 17.8.331 and 17.8.332."[180] The latter regulatory cross-references are to emission limits for fluorides and opacity at the source, both of which relate to the attainment and maintenance of the NAAQS and PSD increments.[181] Moreover, the provision in question also contains ambiguous regulatory text that suggests the exemption extends to other emission limitations applicable to this source category. By stating that operations during startup and shutdown are not representative conditions for determining compliance with "this rule," the provision appears to provide the same exemptions from other emission limitations that may apply to aluminum plants with respect to other air emissions as well. The EPA's longstanding interpretation of the CAA is that SIP provisions containing exemptions during startup and shutdown are not permissible.

The EPA also agrees that ARM 17.8.334 does not qualify as a source-specific emission limitation applicable during startup and shutdown, as recommended in the 1999 SSM Guidance. As explained in section VII.A of this notice, the EPA is clarifying that guidance to eliminate any misperception that exemptions from otherwise applicable emission limitations are permissible during startup and shutdown. States can elect to develop appropriate source-specific alternative emission limitations that

[178] Petition at 50–51.

[179] *Id.* at 51.

[180] *See,* Montana Admin. R 17.8.334(1).

[181] The EPA notes that the state has elected to control fluoride emissions as a means of addressing particulate matter from the affected sources.

apply during startup and shutdown events. The EPA recommended that in order to be approvable (*i.e.*, meet CAA requirements), any new special emission limitations applicable to the source during startup and shutdown should be narrowly tailored and take into account considerations such as the technological limitations of the specific source category and the control technology that is feasible during startup and shutdown. Any such SIP revision that would alter the existing applicable emission limitations for a source during startup and shutdown must meet the same requirements as any other SIP submission, *i.e.*, compliance with CAA sections 110(a), 110(k), 110(l), and 193, and any other CAA provision substantively germane to the SIP revision. Given the text of ARM 17.8.334, however, the EPA believes the state intended not to create a source-specific emission limitation applicable during startup and shutdown but instead merely an exemption for such emissions. Likewise, the EPA does not believe that the issue of special emission limitations during startup or shutdown for a single source or group of sources was contemplated at the time the state created this SIP provision. Nevertheless, the EPA notes that its current SSM Policy does not interpret the CAA to be a bar to special emission limitations in these circumstances, if the state addresses the concern about impacts on NAAQS and PSD increments in some other comparable way.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to ARM 17.8.334. The EPA believes that this provision allows for exemptions from otherwise applicable SIP emission limitations during startup and shutdown and that such exemptions are inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). It is not necessary to reach the Petitioner's argument that this provision is not an appropriate source-specific emission limitation, because the provision at issue instead provides an impermissible exemption for emissions during startup and shutdown. Similarly, it is not necessary to reach the Petitioner's concern with respect to the issue of a single source or group of sources with the potential to cause an exceedance of the NAAQS or PSD increment, because the provision at issue provides an impermissible exemption. For these reasons, the EPA is proposing to find that this provision is substantially inadequate to meet CAA requirements and thus proposes to issue a SIP call with respect to this provision.

3. North Dakota

a. Petitioner's Analysis

The Petitioner objected to two provisions in the North Dakota SIP that create exemptions from otherwise applicable emission limitations.[182] The first provision creates exemptions from a number of cross-referenced opacity limits "where the limits specified in this article cannot be met because of operations and processes such as, but not limited to, oil field service and drilling operations, but only so long as it is not technically feasible to meet said specifications" (N.D. Admin. Code § 33–15–03–04(4)). The second provision creates an implicit exemption for "temporary operational breakdowns or cleaning of air pollution equipment" if the source meets certain conditions (N.D. Admin. Code § 33–15–05–01(2)(a)(1)). The Petitioner claimed that both provisions violate the CAA and the EPA's interpretation of the CAA in the SSM Policy because they create exemptions from otherwise applicable emission limitations for excess emissions during these events rather than treating the excess emissions as violations, and because the provisions could be construed to preclude enforcement of the emission limitations for these violations by the EPA and citizens.

b. The EPA's Evaluation

The EPA believes that N.D. Admin. Code 33–15–03–04.4 and N.D. Admin. Code 33–15–03–04.3 [183] are inconsistent with the requirements of the CAA. These provisions explicitly allow exemptions from the otherwise applicable emission limitations for opacity in several other regulations: N.D. Admin. Code 33–15–03–01, N.D. Admin. Code 33–15–03–02, N.D. Admin. Code 33–15–03–03, and N.D. Admin. Code 33–15–03–03.1. The exemption created by N.D. Admin. Code 33–15–03–04.4 is indefinite in scope and has unclear limits, because it is available whenever a source cannot meet the emission limitations "because of operations or processes such as, but not limited to, oil field service and drilling operations," but "only so long as it is not technically feasible to meet said [emission limitations]". It is unclear whether the provision is intended to apply only to special circumstances, such as malfunctions, or to a broader range of normal source operations. It is also unclear who determines what operations or processes make compliance impossible or who determines when it again becomes technically feasible to meet the limits. Whatever the parameters of this imprecise provision, however, it is clear that it contemplates outright exemptions from the applicable emission limitations under certain circumstances and at certain times.

The EPA believes that N.D. Admin. Code 33–15–03–04.3 is impermissible under the CAA as interpreted in the EPA's SSM Policy as an unbounded director's discretion provision. The provision states that the otherwise applicable emission limitations for opacity in the several other listed regulations do not apply "where an applicable opacity standard is established for a specific source." In accordance with this provision, a state official could modify the opacity limits in a permit or other document to allow emissions in excess of the otherwise applicable SIP limitations. As discussed in section VII.A of this notice, such director's discretion provisions are impermissible. Such an interpretation would make the state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation, which could preclude enforcement by the EPA or the public who might disagree about whether enforcement action is warranted. Most importantly, however, the provision may be read to authorize the state official to create an exemption from the emission limitation, and such an exemption is impermissible in the first instance. The EPA believes that the inclusion of an unbounded director's discretion provision in N.D. Admin. Code 33–15–03–04.3 is thus a substantial inadequacy and renders this specific SIP provision impermissible for this reason.

In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, or malfunctions are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The exemptions provided in N.D. Admin. Code 33–15–03–04.4 are not consistent with CAA requirements, because they would exempt excess emissions that

[182] Petition at 59.

[183] The EPA interprets the Petitioner's reference to N.D. Admin. Code § 33–15–03–04(4) as a citation to N.D. Admin. Code 33–15–03–04.4. The EPA notes also that the Petitioner specifically focused on concern with N.D. Admin. Code 33–15–04.4, but N.D. Admin. Code 33–15–03–04.3 also includes a related problem.

occur during the periods in question. In addition, the provision does not operate to create a source-specific emission limitation that applies during the periods in question, nor does it meet the recommended criteria and parameters for an affirmative defense for violations that occur as a result of a qualifying malfunction. Moreover, the amorphous nature of the provision, in which it is unclear who makes the determination whether the source should be excused from the emission limitations and what the precise parameters are for these exemptions, exacerbates the problem. Thus, the EPA also agrees with the Petitioner's concern that this provision could be interpreted to bar enforcement by the EPA or through a citizen suit, not only because it creates impermissible exemptions but also because of the inherent ambiguities about: (i) Who makes the determination whether the excess emissions are to be considered a violation; and (ii) what constitutes an event during which the excess emissions are to be excused. In its current form, the EPA has concerns not only about the impermissible exemptions created by the provision but also about its practical enforceability as a SIP provision meeting basic CAA requirements for implementation, maintenance, and enforcement of the NAAQS as contemplated in CAA section 110.

The EPA agrees that N.D. Admin. Code 33–15–05–01.2a(1)[184] is also inconsistent with CAA requirements for SIP provisions. This provision creates an implicit exemption for "temporary operational breakdowns or cleaning of air pollution equipment" if the source meets certain conditions. N.D. Admin. Code 33–15–05–01 in general imposes emission limitations for particulate matter from industrial processes, with the limitations stated in terms of the maximum amount of particulate matter allowed in any one hour. Notwithstanding these emission limitations, however, N.D. Admin. Code 33–15–05–01.2a(1) provides that:

> [t]emporary operational breakdowns or cleaning of air equipment for any process *are permitted* provided that the owner or operator immediately advises the department of the circumstances and outlines an acceptable corrective program and provided such operations do not cause an immediate public health hazard (emphasis added).

Although N.D. Admin. Code 33–15–05–01.2a(1) does not explicitly state that the exceedances of the emission limitations are not violations, the EPA believes that this is the most reasonable reading of the provision. Moreover, the title for this subsection is "exceptions," and the immediately preceding provisions impose the emission limitations on sources. Thus, the provision creates an impermissible exemption from the otherwise applicable SIP emission limitations.

The EPA notes that although the state has imposed some conditions on the exemptions, *e.g.*, the requirement to notify state officials of occurrence of the event, this provision would not qualify as an affirmative defense consistent with CAA requirements. First, the exemptions would negate the availability of monetary penalties or injunctive relief in any enforcement proceeding. Second, the conditions for qualifying for the exemption are not consistent with the criteria that EPA recommends for elements of an affirmative defense for which the source bears the burden of proof in order to assure that they are narrowly drawn and available only in suitable circumstances. Third, the provision extends not just to "breakdowns," which presumably equates to malfunctions, but also extends to "cleaning of air equipment," which clearly encompasses excess emissions during normal source maintenance—events for which sources should be designed, operated, and maintained to comply with emission limitations, and during which sources should be expected to comply.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to N.D. Admin. Code 33–15–03–04.4 (cited in the Petition as N.D. Admin. Code § 33–15–03–04(4)). The EPA believes that this provision allows for exemptions from otherwise applicable SIP emission limitations during startup and shutdown and that such exemptions are inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, the EPA believes that this provision is sufficiently ambiguous that it would be difficult for the state, the EPA, or the public to enforce the provision effectively in its current form, and that this provision is thus inconsistent with the requirements of CAA section 110(a) on this basis as well. For these reasons, the EPA is proposing to find that this provision is substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to this provision.

The EPA also proposes to grant the Petition with respect to N.D. Admin. Code 33–15–03–04.3 (cited in the Petition as N.D. Admin. Code § 33–15–03–04(3)). The EPA believes that this provision allows for discretionary exemptions from otherwise applicable emission limitations through a state official's unilateral exercise of discretionary authority that is insufficiently bounded. Such provisions are inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions. Moreover, the discretion created by these provisions allows case-by-case exemptions from emission limitations, when such exemptions are not permissible in the first instance. Such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For these reasons, the EPA is proposing to find that this provision is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

The EPA also proposes to grant the Petition with respect to N.D. Admin. Code 33–15–05–01.2a(1) (cited in the Petition as N.D. Admin. Code § 33–15–05–01(2)(a)(1)). The EPA believes that this provision allows for exemptions from otherwise applicable SIP emission limitations during operational breakdowns (*i.e.*, malfunctions) or cleaning of air equipment (*i.e.*, maintenance) and that such exemptions are inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For these reasons, the EPA is also proposing to find that this provision is substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to this provision.

4. South Dakota

a. Petitioner's Analysis

The Petitioner objected to a provision in the South Dakota SIP that creates exemptions from otherwise applicable SIP emission limitations (S.D. Admin, R. 74:36:12:02(3)).[185] The Petitioner asserted that the provision imposes visible emission limitations on sources but explicitly excludes emissions that occur "for brief periods during such operations as soot blowing, start-up, shut-down, and malfunctions." The Petitioner argued that such automatic exemptions for excess emissions is contrary to the requirements of the CAA for SIP provisions, as well as contrary to the EPA's 1982 SSM Guidance and 1999 SSM Guidance.

[184] The EPA interprets the Petitioner's reference to N.D. Admin. Code § 33–15–05–01(2)(a)(1) as a citation to N.D. Admin. Code 33–15–05–01.2a(1).

[185] Petition at 66.

b. The EPA's Evaluation

The EPA agrees that S.D. Admin. R. 74:36:12:02(3) is inconsistent with CAA requirements for SIP provisions. This provision creates an exemption from applicable visible emission limitations from the generally applicable SIP requirements. The S.D. Admin. R. 74:36:12:01 imposes a generally applicable opacity limit on all sources, measured using the EPA's Method 9. However, S.D. Admin. R. 74:36:12:02 provides exceptions to these limits and, in particular, in S.D. Admin. R. 74:36:12:02(3) includes an explicit exemption for emissions for "brief periods during such operations as soot blowing, start-up, shut-down, and malfunctions."

In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, or malfunctions are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. In addition, the EPA's SSM Policy has long interpreted the CAA not to permit exemptions for excess emissions during other modes of normal source operation, such as "soot blowing." The EPA notes that by its terms, S.D. Admin. R. 74:36:12:02(3) implies that it also would exempt excess emissions during other modes of normal source operation because it explicitly applies to events "such as" the four listed types, therefore implying it is not an exclusive list and could extend to other types of events as well. The exemptions provided in S.D. Admin. R. 74:36:12:02(3) are not consistent with CAA requirements, because they would exempt excess emissions that occur during the periods in question. Excess emissions must be treated as violations of the applicable emission limitations.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to S.D. Admin. R. 74:36:12:02(3). The EPA believes that this provision allows for exemptions from otherwise applicable SIP emission limitations during startup, shutdown, and malfunction, as well as during other modes of normal source operations such as "soot blowing." Automatic exemptions from otherwise applicable SIP emission limitations are inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For these reasons, the EPA is also proposing to find that this provision is substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to this provision.

5. Wyoming

a. Petitioner's Analysis

The Petitioner objected to a specific provision in the Wyoming SIP that provides an exemption for excess particulate matter emissions from diesel engines during startup, malfunction, and maintenance (ENV–AQ–1 Wyo. Code R. § 2(d)).[186] The provision exempts emission of visible air pollutants from diesel engines from applicable SIP limitations "during a reasonable period of warmup following a cold start or where undergoing repairs and adjustment following malfunction." The Petitioner argued that this exemption "is contrary to EPA policy for source category-specific rules for startup and shutdown."[187] Accordingly, the Petitioner requested that this provision be eliminated from the SIP.

b. The EPA's Evaluation

The EPA believes that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, or malfunctions are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The EPA believes that the inclusion of such an exemption in WAQSR Chapter 3, section 2(d) from otherwise applicable SIP emission limitations for violations during cold startup or following malfunction of diesel engines is a substantial inadequacy and renders this specific SIP provision impermissible.

The EPA notes that WAQSR Chapter 3, section 2(d) does not appear to comply with the CAA's requirements for source category-specific rules for startup and shutdown as interpreted in the EPA's SSM Policy. The provision provides that the otherwise applicable emission "limitation shall not apply during a reasonable period of warmup following a cold start." Recent court decisions have made clear that automatic exemptions from otherwise applicable SIP emission limitations for excess emissions during periods of startup are not in fact permissible under the CAA. As discussed in section VII.A of this notice, states may elect to develop alternative emission limitations or other forms of enforceable control measures or techniques that apply during startup or shutdown, but exemptions for excess emissions during such periods are inconsistent with the fundamental requirements of the CAA.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to WAQSR Chapter 3, section 2(d) (cited as ENV–AQ–1 Wyo. Code R. § 2(d) in the Petition). The EPA believes that this provision allows for exemptions from otherwise applicable SIP emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, by creating these impermissible exemptions, the state has defined violations in a way that would interfere with effective enforcement by the EPA and citizens for excess emissions during these events as provided in CAA sections 113 and 304. For these reasons, the EPA is proposing to find that this provision is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

J. Affected States and Local Jurisdictions in EPA Region IX

1. Arizona

a. Petitioner's Analysis

The Petitioner objected to two provisions in the Arizona Department of Air Quality's (ADEQ) Rule R18–2–310, which provide affirmative defenses for excess emissions during malfunctions (AAC Section R18–2–310(B)) and for excess emissions during startup or shutdown (AAC Section R18–2–310(C)).[188] First, the Petitioner asserted

[186] Petition at 74. The EPA notes that the Petitioner appears to have provided an incorrect citation to this provision; accordingly, in this notice, the EPA replaces that citation with the following: "Wyoming Air Quality Standards and Regulations (WAQSR) Chapter 3, section 2(d)."

[187] *Id.*

[188] Petition at 20–22.

that all affirmative defenses for excess emissions are inconsistent with the CAA and should be removed from the Arizona SIP.

Additionally, quoting from the EPA's statement in the SSM Policy that such affirmative defenses should not be available to "a single source or small group of sources [that] has the potential to cause an exceedance of the NAAQS or PSD increments," the Petitioner contended that "sources with the power to cause an exceedance should be strictly controlled at all times, not just when they actually cause an exceedance." [189] Although acknowledging that R18–2–310 contains some limitations to address this issue, the Petitioner argued that the limitation in the SIP provision is not the same as entirely disallowing affirmative defenses for these types of sources, which removes the "incentive" for such sources to emit at levels close to those that would violate a NAAQS or PSD increment. Accordingly, the Petitioner requested that the EPA require Arizona either to entirely remove R18–2–310(B) and (C) from the SIP or to revise the rule so that affirmative defenses are not available to a single source or any small group of sources that has the potential to cause an exceedance of the NAAQS.

Second, the Petitioner asserted that the provision applicable to startup and shutdown periods (R18–2–310(C)) does not include an explicit requirement for a source seeking to establish an affirmative defense to prove that "the excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance." The Petitioner provided a table specifically comparing the provisions in R18–2–310(C) against the EPA's recommended criteria in the 1999 SSM Guidance to show that R18–2–310(C) does not contain a specific provision to address this recommended criterion and stated that the rule should be revised to require such a demonstration.

b. The EPA's Evaluation

The EPA disagrees with the Petitioner's contention that no affirmative defense provisions are permissible in SIPs under the CAA. As explained in more detail in section IV of this notice, the EPA interprets the CAA to allow affirmative defense provisions for malfunctions. So long as these provisions are narrowly drawn and consistent with the CAA, as recommended in the EPA's guidance for affirmative defense provisions in SIPs, the EPA believes that states may elect to have affirmative defense provisions for malfunctions.

With respect to the potential air quality impacts of a "single source or small group of sources," the EPA believes that R18–2–310 satisfies the statutory requirements as interpreted in the EPA guidance. Rule R18–2–310 specifies five types of standards or limitations for which affirmative defenses are *not* available under the rule and includes among those five types: standards or limitations contained in any PSD or NSR permit issued by the EPA; standards or limitations included in a PSD permit issued by the ADEQ to meet the requirements of R18–2–406(A)(5) (Permit Requirements for Sources Located in Attainment and Unclassifiable Areas); and standards or limitations contained in R18–2–715(F) ("Standards of Performance for Existing Primary Copper Smelters; Site-specific Requirements") (R18–2–310(A)). Thus, no existing primary copper smelter subject to emission standards or limitations under R18–2–715(F) may seek an affirmative defense for any emissions in excess of those provisions, and likewise no major stationary source subject to permit conditions designed to protect the PSD increments in a PSD permit issued by ADEQ or the EPA may seek an affirmative defense for any emissions in excess of those permit conditions. Existing copper smelters are, to the EPA's knowledge, the only sources under ADEQ jurisdiction that have the potential to cause an exceedance of the NAAQS, and requirements to protect the PSD increments are implemented entirely through PSD permits issued by states and the EPA. Accordingly, the clear exclusion of these standards and limitations from the affirmative defense provisions in R18–2–310 adequately addresses the EPA's concerns with respect to potential violations of the NAAQS or PSD increments.

With respect to other emission standards or limitations (*i.e.*, those not specifically excluded from coverage under the rule), R18–2–310 requires each source seeking to establish an affirmative defense to demonstrate, among other things, that "[d]uring the period of excess emissions there were no exceedances of the relevant ambient air quality standards * * * that could be attributed to the emitting source" (R18–2–310(B)(7), (C)(1)(f)). The state's election to provide such an affirmative defense *contingent upon* a demonstration by the source that there were no exceedances of the relevant ambient air quality standards during the relevant period that could be attributed to the emitting source reasonably assures that these affirmative defense provisions will not create incentives to emit at higher levels or interfere with attainment and maintenance of the NAAQS. As described in section VII.B of this notice, the EPA considers this type of requirement an acceptable alternative approach to address the concern of sources or small groups of sources that could adversely impact the NAAQS or PSD increments through excess emissions.

Second, with respect to the Petitioner's assertion that R18–2–310 should be revised to require a demonstration that excess emissions during startup or shutdown are not part of a recurring pattern indicative of inadequate design, operation, or maintenance, it is not necessary to reach this issue. Instead, the EPA is proposing to modify its interpretation of the CAA with respect to affirmative defenses for startup and shutdown to eliminate the recommended criteria for such provisions as articulated in the 1999 SSM Guidance and to find, instead, that all affirmative defense provisions for planned startup and shutdown periods are not appropriate for SIP provisions under the CAA. As discussed in sections IV and VII.C of this notice, the EPA believes that affirmative defense provisions are appropriate in SIPs for malfunctions but not for startup and shutdown.

c. The EPA's Proposal

The EPA proposes to deny the Petition with respect to the arguments concerning ADEQ's affirmative defense provisions for malfunctions in R18–2–310(B). For the reasons provided above and in our previous approval of R18–2–310 into the Arizona SIP,[190] the EPA believes that these affirmative defense provisions are consistent with the requirements of the CAA.

With respect to the arguments concerning ADEQ's affirmative defense provisions for startup and shutdown periods in R18–2–310(C), however, the EPA proposes to grant the Petition, because R18–2–310(C) is inconsistent with the requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k), as well as CAA sections 113 and 304. The EPA believes that a SIP provision establishing an affirmative defense for planned startup and shutdown periods is substantially inadequate to comply with CAA requirements. For these reasons, the EPA is proposing to issue a SIP call with respect to R18–2–310(C).

[189] Petition at 20.

[190] *See*, 66 FR 48085 at 48087 (Sept. 18, 2001) (final rule approving R18–2–310 into Arizona SIP).

2. Arizona: Maricopa County

a. Petitioner's Analysis

The Petitioner objected to two provisions in the Maricopa County Air Pollution Control Regulations that provide affirmative defenses for excess emissions during malfunctions (Maricopa County Air Pollution Control Regulation 3, Rule 140, § 401) and for excess emissions during startup or shutdown (Maricopa County Air Pollution Control Regulation 3, Rule 140, § 402).[191] These provisions in Maricopa County Air Quality Department (MCAQD) Rule 140 are similar to the affirmative defense provisions in ADEQ R18–2–310.

First, the Petitioner asserted that the affirmative defense provisions in Rule 140 are problematic for the same reasons identified in the Petition with respect to ADEQ R18–2–310. Specifically, the Petitioner argued that affirmative defenses should not be allowed in any SIP and, alternatively, that to the extent affirmative defenses are permissible, the provisions in Rule 140 addressing exceedances of the ambient standards are "inappropriately permissive and do not comply with EPA guidance."[192] Accordingly, the Petitioner requested that the EPA require Arizona and/or MCAQD either to entirely remove these provisions from the SIP or to revise them so that they are not available to a single source or small group of sources that has the potential to cause a NAAQS exceedance. Second, the Petitioner asserted that the provisions for startup and shutdown in Rule 140 do not include an explicit requirement for a source seeking to establish an affirmative defense to prove that "the excess emissions in question were not part of a recurring pattern indicative of inadequate design, operation, or maintenance." The Petitioner argued that Rule 140 should be revised to require such a demonstration.

b. The EPA's Evaluation

First, with respect to the potential air quality impacts of a "single source or small group of sources," the EPA believes that MCAQD Rule 140 satisfies the statutory requirements as interpreted in the EPA's guidance. Rule 140 specifies four types of standards or limitations for which affirmative defenses are *not* available under the rule, including standards and limitations contained in any Prevention of Significant Deterioration (PSD) or New Source Review (NSR) permit issued by the EPA, and standards and limitations included in a PSD permit issued by MCAQD to meet the requirements of subsection 308.1(e) of Rule 240 (Permit Requirements For New Major Sources And Major Modifications To Existing Major Sources) (Rule 140, sections 103.3, 103.4). Thus, no major stationary source subject to permit conditions designed to protect the PSD increments in a PSD permit issued by MCAQD or the EPA may seek an affirmative defense for any emissions in excess of those permit conditions. These provisions adequately address the EPA's concerns regarding potential violations of the PSD increments.

Rule 140 also requires each source seeking to establish an affirmative defense to demonstrate, among other things, that "[d]uring the period of excess emissions there were no exceedances of the relevant ambient air quality standards * * * that could be attributed to the emitting source" (Rule 140, sections 401.7, 402.1(f)). The state's election to provide such an affirmative defense *contingent upon* a demonstration by the source that there were no exceedances of the relevant ambient air quality standards during the relevant period that could be attributed to the emitting source reasonably assures that these affirmative defenses provisions will not create incentives to emit at higher levels or interfere with attainment and maintenance of the NAAQS. As described in section VII.B of this notice, the EPA considers this type of requirement an acceptable alternative approach to address the concern of sources or small groups of sources that could adversely impact the NAAQS or PSD increments through excess emissions.

Second, with respect to the Petitioner's assertion that MCAQD Rule 140 should be revised to require a demonstration that excess emissions during startup or shutdown are not part of a recurring pattern indicative of inadequate design, operation, or maintenance, it is not necessary to reach this issue. Instead, the EPA is proposing to modify its interpretation of the CAA with respect to affirmative defenses for startup and shutdown to eliminate the recommended criteria for such provisions as articulated in the 1999 SSM Guidance and to find, instead, that all affirmative defense provisions for planned startup and shutdown periods are not appropriate for SIP provisions under the CAA. As discussed in sections IV and VII.C of this notice, the EPA believes that affirmative defense provisions are appropriate in SIPs for malfunctions but not for startup and shutdown.

c. The EPA's Proposal

The EPA proposes to deny the Petition with respect to the arguments concerning MCAQD's affirmative defense provisions for malfunctions in Rule 140, section 401. For the reasons provided above and in our previous approval of Rule 140 into the Arizona SIP,[193] the EPA believes that these affirmative defense provisions are consistent with the requirements of the CAA.

With respect to the arguments concerning ADEQ's affirmative defense provisions for startup and shutdown periods in Rule 140, section 402, however, the EPA proposes to grant the Petition, because it is inconsistent with the requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k), as well as CAA sections 113 and 304. The EPA believes that a SIP provision establishing an affirmative defense for planned startup and shutdown periods is substantially inadequate to comply with CAA requirements. For these reasons, the EPA is proposing to issue a SIP call with respect to Maricopa County Air Pollution Control Regulation 3, Rule 140, § 402.

3. Arizona: Pima County

a. Petitioner's Analysis

The Petitioner objected to a provision in the Pima County Department of Environmental Quality's (PCDEQ) Rule 706 that pertains to enforcement discretion.[194] Quoting from paragraph (D) of Rule 706, which provides that "[t]he Control Officer may defer prosecution of a Notice of Violation issued for an exceedance of a control standard if * * *" certain conditions are met, the Petitioner argued that ambiguity in this provision could be construed to preclude enforcement by the EPA or citizens. The Petitioner requested that the EPA require the PCDEQ and/or Arizona to revise this provision to make clear that a decision by the Pima County Control Officer not to enforce under the rule would in no way affect enforcement by the EPA or citizens.

b. The EPA's Evaluation

The EPA disagrees with the Petitioner's assertion that Rule 706 creates ambiguity that could be construed to preclude enforcement by the EPA or through a citizen suit. Paragraph (D) of Rule 706 states that "[t]he control officer *may* defer prosecution of a Notice of Violation

[191] Petition at 23.

[192] Petition at 23.

[193] *See*, 67 FR 54957 (Aug. 27, 2002) (final rule approving Rule 140 into Arizona SIP).

[194] Petition at 23–24.

issued for an exceedance of a control standard *if*" four specific conditions are met (PCDEQ Rule 706, paragraph (D), emphasis added). Rule 706 does not address the EPA or citizen enforcement in any way and on its face does nothing to preclude enforcement by the EPA or through a citizen suit. Even with respect to the PCDEQ's authorities, the rule authorizes but does not require the Control Officer to defer prosecution where the identified criteria are met.

c. The EPA's Proposal

The EPA proposes to deny the Petition with respect to PCDEQ Rule 706. The EPA believes that the provision regarding enforcement in paragraph (D) of this rule clearly applies only to the PCDEQ Control Officer and could not reasonably be read by a court to foreclose enforcement by the EPA or through a citizen suit where the PCDEQ Control Officer elects to exercise enforcement discretion. The EPA solicits comment on this issue, in particular from the State of Arizona and from the PCDEQ, to assure that there is no misunderstanding with respect to the correct interpretation of Rule 706.

K. Affected States in EPA Region X

1. Alaska

a. Petitioner's Analysis

The Petitioner objected to a provision in the Alaska SIP that provides an excuse for "unavoidable" excess emissions that occur during SSM events, including startup, shutdown, scheduled maintenance, and "upsets" (Alaska Admin. Code tit. 18 § 50.240).[195] The provision provides: "Excess emissions determined to be unavoidable under this section will be excused and are not subject to penalty. This section does not limit the department's power to enjoin the emission or require corrective action." The Petitioner argued that this provision excuses excess emissions in violation of the CAA and the EPA's SSM Policy, which require all such emissions to be treated as violations of the applicable SIP emission limitations. The Petitioner further argued that it is unclear whether the provision could be interpreted to bar enforcement actions brought by the EPA or citizens, because it is drafted as if the state were the sole enforcement authority. Finally, the Petitioner pointed out, the provision is worded as if it were an affirmative defense, but it uses criteria for enforcement discretion.

[195] Petition at 18–20.

b. The EPA's Evaluation

The EPA interprets Alaska Admin. Code tit. 18 § 50.240 as providing an affirmative defense under which excess emissions that occur during certain SSM events may be "excused" if the requisite showing is made by the source. This provision is substantially inadequate for three reasons. First, provisions that allow a state official's decision to bar EPA or citizen enforcement are impermissible under the CAA. Although Alaska Admin. Code tit. 18 § 50.240 states that it "does not limit the *department's* power to enjoin the emission nor require corrective action" (emphasis added), it also states that "[e]xcess emissions determined to be unavoidable under this section will be excused and are not subject to penalty." The net effect of this language appears to bar the EPA and the public from seeking injunctive relief. Moreover, the provision is ambiguous as to whether the EPA or the public could pursue an action for civil penalties if they disagreed with the state official's determination that excess emissions were unavoidable.

Second, as explained more fully in sections IV.B and VII.C of this notice, the EPA believes that affirmative defense provisions that apply to startup, shutdown, or maintenance events are inconsistent with the requirements of the CAA. Consequently, Alaska Admin. Code tit. 18 § 50.240, which applies to excess emissions that occur during startup, shutdown, and scheduled maintenance, is impermissible for this reason as well.

Finally, while the EPA continues to believe that affirmative defense provisions applying to malfunctions can be consistent with the CAA, as long as the criteria set forth in the SSM Policy are carefully adhered to (as explained in more detail in sections IV.B and VII.B of this notice), the criteria in Alaska Admin. Code tit. 18 § 50.240 are not sufficiently similar to those recommended in the EPA's SSM Policy to assure that the affirmative defense is available only in appropriately narrow circumstances. The EPA acknowledges that the SSM Policy is only guidance concerning what types of SIP provisions could be consistent with the requirements of the CAA. Nonetheless, through this rulemaking, the EPA is proposing to determine that Alaska Admin. Code tit. 18 § 50.240 does not include criteria that are sufficiently robust to qualify as an acceptable affirmative defense provision for malfunctions (*i.e.*, upsets). For example, the defense available in Alaska Admin. Code tit. 18 § 50.240 is not limited to excess emissions caused by sudden, unavoidable, breakdown of technology beyond the control of the owner or operator. Similarly, the provision contains neither a statement that the defense does not apply in situations where a single source or small group of sources has the potential to cause an exceedance of the NAAQS or PSD increments nor a requirement that sources make an after-the-fact showing that no such exceedance occurred. Accordingly, the EPA agrees with the Petitioner's contention that the provision is substantially inadequate to satisfy the requirements of the CAA.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Alaska Admin. Code tit. 18 § 50.240. The provision applies to startup, shutdown, and maintenance events, contrary to the EPA's interpretation of the CAA to allow such affirmative defenses only for malfunctions. Additionally, the section of Alaska Admin. Code tit. 18 § 50.240 applying to "upsets" is inadequate because the criteria referenced are not sufficiently similar to those recommended in the EPA's SSM Policy for affirmative defense provisions applicable to malfunctions. Thus, the provision is inconsistent with the requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). Moreover, the provision appears to bar the EPA and citizens from seeking penalties and injunctive relief. As a result, Alaska Admin. Code tit. 18 § 50.240 is inconsistent with the fundamental requirements of CAA sections 113 and 304. For these reasons, the EPA is proposing to find that the provision is substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to the provision.

2. Idaho

a. Petitioner's Analysis

The Petitioner objected to a provision in the Idaho SIP that appears to grant enforcement discretion to the state as to whether to impose penalties for excess emissions during certain SSM events (Idaho Admin. Code r. 58.01.01.131).[196] The provision provides that "[t]he Department shall consider the sufficiency of the information submitted and the following criteria to determine if an enforcement action to impose penalties is warranted * * *." The Petitioner argued that this provision could be interpreted to give the Department authority to decide that

[196] Petition at 33.

enforcement is not warranted by anyone, thereby precluding action by the EPA and citizens for civil penalties or injunctive relief.

b. The EPA's Evaluation

The EPA's SSM Policy interprets the CAA to allow states to elect to have appropriately drawn SIP provisions addressing the exercise of enforcement discretion by state personnel. As the Petitioner recognized, Idaho Admin. Code r. 58.01.01.131 appears to be a statement of enforcement discretion, and it delineates factors that will be considered by the Department in determining whether to pursue enforcement for violations due to excess emissions. Subsection 101.03 of the provision clearly states that "[a]ny decision by the Department * * * shall not excuse the owner or operator from compliance with the relevant emission standard." There is no language suggesting that the Department's determination to forgo state enforcement against a source would in any way preclude the EPA or the public from demonstrating that violations occurred or from taking enforcement action. Consequently, the EPA believes the provision is consistent with the requirements of the CAA.

c. The EPA's Proposal

The EPA proposes to deny the Petition with respect to Idaho Admin. Code r. 58.01.01.131. The EPA interprets this provision to allow both the EPA and the public to seek civil penalties or injunctive relief, regardless of how the state chooses to exercise its enforcement discretion. The EPA solicits comments on this issue, in particular from the State of Idaho, to assure that there is no misunderstanding with respect to the correct interpretation of Idaho Admin. Code r. 58.01.01.131.

3. Oregon

a. Petitioner's Analysis

The Petitioner objected to a provision in the Oregon SIP that grants enforcement discretion to the state to pursue violations for excess emissions during certain SSM events (Or. Admin. R. 340–028–1450).[197] The provision provides that "[i]n determining if a period of excess emissions is avoidable, and whether enforcement action is warranted, the Department, based upon information submitted by the owner and or operator, shall consider whether the following criteria are met * * *." The Petitioner argued that this provision could be interpreted to give the Department authority to decide that enforcement is not warranted by anyone, thereby precluding action by the EPA and citizens for civil penalties or injunctive relief.

b. The EPA's Evaluation

After the Petition was filed, the provision of the Oregon SIP cited by the Petitioner was recodified and revised by the state and was submitted to the EPA as part of a SIP revision. The EPA approved the SIP revision on December 27, 2011.[198] The provision has been recodified and revised at Or. Admin. R. 340–214–0350. The provision as recodified provides that "[i]n determining whether to take enforcement action for excess emissions, the Department considers, based upon information submitted by the owner or operator," a list of factors.

The EPA's SSM Policy interprets the CAA to allow states to elect to have SIP provisions that pertain to the exercise of enforcement discretion by state personnel. As revised by Oregon and approved by the EPA into the SIP, Or. Admin. R. 340–214–0350 is plainly a statement of enforcement discretion, and it delineates factors that will be considered by the Department in determining whether to pursue state enforcement for violations of the applicable SIP emission limitations due to excess emissions. There is no language in this provision suggesting that the Department's determination to forgo enforcement against a source would in any way preclude the EPA or the public from demonstrating that violations occurred and taking enforcement action. Consequently, the EPA believes the current SIP provision is consistent with the requirements of the CAA.

c. The EPA's Proposal

The EPA proposes to deny the Petition with respect to Or. Admin. R. 340–028–1450. This provision has since been recodified and approved by the EPA at Or. Admin. R. 340–214–0350. The EPA interprets the recodified provision to allow both the EPA and the public to seek civil penalties or injunctive relief, regardless of how the state chooses to exercise its enforcement discretion. The EPA solicits comments on this issue, in particular from the State of Oregon, to assure that there is no misunderstanding with respect to the correct interpretation of Or. Admin. R. 340–214–0350.

4. Washington

a. Petitioner's Analysis

The Petitioner objected to a provision in the Washington SIP that provides an excuse for "unavoidable" excess emissions that occur during certain SSM events, including startup, shutdown, scheduled maintenance, and "upsets" (Wash. Admin. Code § 173–400–107).[199] The provision provides that "[e]xcess emissions determined to be unavoidable under the procedures and criteria under this section shall be excused and are not subject to penalty." The Petitioner argued that this provision excuses excess emissions in violation of the CAA and the EPA's SSM Policy, which require all such emissions to be treated as violations of the applicable SIP emission limitations. The Petitioner further argued that it is unclear whether the provision could be interpreted to bar enforcement actions brought by the EPA or citizens, because it is drafted as if the state were the sole enforcement authority. Finally, the Petitioner pointed out, the provision is worded as if it were an affirmative defense, but it uses criteria for enforcement discretion.

b. The EPA's Evaluation

The EPA interprets Wash. Admin. Code § 173–400–107 as an affirmative defense under which excess emissions that occur during certain SSM events can be "excused" if the requisite showing is made by the source. This provision is substantially inadequate for four reasons. First, provisions that allow a state official's decision to bar the EPA or citizen enforcement are impermissible under the CAA. The Wash. Admin. Code § 173–400–107 provides that "[t]he owner or operator of a source shall have the burden of proving to Ecology or the authority or the decision-maker in an enforcement action that excess emissions were unavoidable." This language makes clear that the state's determination is not binding on the EPA or the public, because it refers to other authorities and decision-makers besides the state agency. However, the provision also states that "[e]xcess emissions determined to be unavoidable * * * shall be excused and not subject to penalty." This language could be interpreted to preclude those excess emissions deemed "unavoidable" from being considered violations of the applicable SIP emission limitations, and thus it could preclude enforcement by the EPA or through a citizen suit.

Second, it is unclear whether the affirmative defense applies only to

[197] Petition at 63.

[198] 76 FR 80725 at 80747.

[199] Petition at 71–72.

actions for monetary penalties or could also be used to bar actions seeking injunctive relief. Although the EPA believes that narrowly drawn affirmative defenses are permitted under the CAA for malfunction events, as discussed in sections IV.B and VII.B of this notice, the EPA's interpretation is that such affirmative defenses can only shield the source from monetary penalties and cannot be a bar to injunctive relief.

Third, as explained more fully in sections IV.B and VII.C of this notice, the EPA believes that affirmative defense provisions that apply to startup, shutdown, or maintenance events are inconsistent with the requirements of the CAA on their face. Consequently, Wash. Admin. Code § 173–400–107, which applies to excess emissions that occur during startup, shutdown, and scheduled maintenance, is impermissible for this reason as well.

Finally, while the EPA continues to believe that affirmative defense provisions applying to malfunctions can be consistent with the CAA as long as the criteria set forth in the SSM Policy are carefully adhered to, as discussed in sections IV.B and VII.B of this notice, the criteria in Wash. Admin. Code § 173–400–107 are not sufficiently similar to those recommended in the EPA's SSM Policy to assure that the affirmative defense is available only in appropriately narrow circumstances. The EPA acknowledges that the SSM Policy is only guidance concerning what types of SIP provisions could be consistent with the requirements of the CAA. Nonetheless, through this rulemaking, the EPA is proposing to determine that Wash. Admin. Code § 173–400–107 does not include criteria that are sufficiently robust to qualify as an acceptable affirmative defense provision for malfunctions (*i.e.*, "upsets"). For example, the defense available in Wash. Admin. Code § 173–400–107 is not limited to excess emissions caused by sudden, unavoidable, breakdown of technology beyond the control of the owner or operator. Similarly, the provision contains neither a statement that the defense does not apply in situations where a single source or small group of sources has the potential to cause an exceedance of the NAAQS or PSD increments nor a requirement that sources make an after-the-fact showing that no such exceedance occurred. As a result, the EPA believes that the provision is substantially inadequate to satisfy the requirements of the CAA.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Wash. Admin. Code § 173–400–107. The provision applies to startup, shutdown, and maintenance events, contrary to the EPA's interpretation of the CAA to allow such affirmative defenses only for malfunctions. Furthermore, the section of Wash. Admin. Code § 173–400–107 applying to "upsets" is inadequate because the criteria referenced are not sufficiently similar to those recommended in the EPA's SSM Policy for affirmative defenses for excess emissions due to malfunctions. Finally, the provision is unclear as to whether the EPA and the public could still seek injunctive relief if a state official made a determination that excess emissions were unavoidable. As a result, the EPA believes that Wash. Admin. Code § 173–400–107 is inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For these reasons, the EPA is proposing to find that the provision is substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to the provision.

X. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action" because it raises novel legal or policy issues. Accordingly, the EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011) and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. The EPA's proposed action in response to the Petition merely reiterates the EPA's interpretation of the statutory requirements of the CAA and does not require states to collect any additional information. To the extent that the EPA proposes to grant the Petition and thus proposes to issue a SIP call to a state under CAA section 110(k)(5), the EPA is only proposing an action that requires the state to revise its SIP to comply with existing requirements of the CAA.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[200]

After considering the economic impacts of this proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. Courts have interpreted the RFA to require a regulatory flexibility analysis only when small entities will be subject to the requirements of the rule. *See, e.g., Michigan* v. *EPA*, 213 F.3d 663 (D.C. Cir. 2000); *Mid-Tex Elec. Co-op, Inc.* v. *FERC*, 773 F.2d 327 (D.C. Cir. 1985). This proposed rule will not impose any requirements on small entities. Instead, the proposed action merely reiterates the EPA's interpretation of the statutory requirements of the CAA. To the extent that the EPA proposes to grant the Petition and thus proposes to issue a SIP call to a state under CAA section 110(k)(5), the EPA is only proposing an action that requires the state to revise its SIP to comply with existing requirements of the CAA. The EPA's action, therefore, would leave to states the choice of how to revise the SIP provision in question to make it consistent with CAA requirements and determining, among other things, which of the several lawful approaches to the treatment of excess emissions during SSM events will be applied to particular sources. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This rule does not contain a federal mandate that may result in expenditures of $100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year. The action may impose a duty on

[200] Small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impacts of this notice on small entities, *small entity* is defined as: (1) A small business that is a small industrial entity as defined in the U.S. Small Business Administration (SBA) size standards (see 13 CFR 121.201); (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

certain state governments to meet their existing obligations to revise their SIPs to comply with CAA requirements. The direct costs of this action on states would be those associated with preparation and submission of a SIP revision by those states for which the EPA issues a SIP call. Examples of such costs could include development of a state rule, conducting notice and public hearing, and other costs incurred in connection with a SIP submission. These aggregate costs would be far less than the $100-million threshold in any one year. Thus, this rule is not subject to the requirements of sections 202 or 205 of UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. The regulatory requirements of this action would apply to the states for which the EPA issues a SIP call. To the extent that such states allow local air districts or planning organizations to implement portions of the state's obligation under the CAA, the regulatory requirements of this action would not significantly or uniquely affect small governments because those governments have already undertaken the obligation to comply with the CAA.

E. Executive Order 13132—Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 because it will simply maintain the relationship and the distribution of power between the EPA and the states as established by the CAA. The proposed SIP calls are required by the CAA because the EPA is proposing to find that the current SIPs of the affected states are substantially inadequate to meet fundamental CAA requirements. In addition, the effects on the states will not be substantial because where a SIP call is finalized for a state, the SIP call will require the affected state to submit only those revisions necessary to address the SIP deficiencies and applicable CAA requirements. While this action may impose direct effects on the states, the expenditures would not be substantial because they would be far less than $25 million in the aggregate in any one year.[201] Thus, Executive Order 13132 does not apply to this action.

In the spirit of Executive Order 13132, and consistent with the EPA policy to promote communications between the EPA and state and local governments, the EPA specifically solicits comment on this proposed rule from state and local officials.

F. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). In this action, the EPA is not addressing any tribal implementation plans. This action is limited to states. Thus, Executive Order 13175 does not apply to this action. However, the EPA invites comment on this proposed action from tribal officials.

G. Executive Order 13045—Protection of Children From Environmental Health Risks and Safety Risks

The EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it merely prescribes the EPA's action for states regarding their obligations for SIPs under the CAA.

H. Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a "significant energy action" as defined in Executive Order 13211 (66 FR 28355(May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This action merely prescribes the EPA's action for states regarding their obligations for SIPs under the CAA.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs the EPA to provide Congress, through OMB, explanations when the EPA decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore, the EPA is not considering the use of any voluntary consensus standards.

J. Executive Order 12898—Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, Feb. 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the U.S.

The EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. The rule is intended to ensure that all communities and populations across the affected states, including minority, low-income and indigenous populations overburdened by pollution, receive the full human health and environmental protection provided by the CAA. This proposed action concerns states' obligations regarding the treatment they give, in rules included in their SIPs under the CAA, to excess emissions during startup, shutdown, and malfunctions. This proposed action would require 36 states to bring their treatment of these emissions into line with CAA requirements, which would lead to sources' having greater incentives to control emissions during such events.

K. Determination Under Section 307(d)

Pursuant to CAA section 307(d)(1)(U), the Administrator determines that this action is subject to the provisions of section 307(d). Section 307(d)(1)(U) provides that the provisions of section

[201] "EPA's Action Development Process-Guidance on Executive Order 13132: Federalism," dated November 2008.

307(d) apply to "such other actions as the Administrator may determine."

L. Judicial Review

Section 307(b)(1) of the CAA indicates which Federal Courts of Appeal have venue for petitions of review of final agency actions by the EPA under the CAA. This section provides, in part, that petitions for review must be filed in the Court of Appeals for the District of Columbia Circuit (i) when the agency action consists of "nationally applicable regulations promulgated, or final actions taken, by the Administrator," or (ii) when such action is locally or regionally applicable, if "such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination."

This rule responding to the Petition is "nationally applicable" within the meaning of section 307(b)(1). First, the rulemaking addresses a Petition that raises issues that are applicable in all states and territories in the U.S. For example, the Petitioner requested that the EPA revise its SSM Policy with respect to whether affirmative defense provisions in SIPs are consistent with CAA requirements. The EPA's response is relevant for all states nationwide. Second, the rulemaking will address a Petition that raises issues relevant to specific existing SIP provisions in 39 states across the U.S. that are located in each of the 10 EPA Regions, 10 different federal circuits, and multiple time zones. Third, the rulemaking addresses a common core of knowledge and analysis involved in formulating the decision and a common interpretation of the requirements of the CAA being applied to SIPs in states across the country. Fourth, the rulemaking, by addressing issues relevant to appropriate SIP provisions in one state, may have precedential impacts upon the SIPs of other states nationwide. Courts have found similar rulemaking actions to be of nationwide scope and effect.[202]

This determination is appropriate because in the 1977 CAA Amendments that revised CAA section 307(b)(1), Congress noted that the Administrator's determination that an action is of "nationwide scope or effect" would be appropriate for any action that has "scope or effect beyond a single judicial circuit." H.R. Rep. No. 95–294 at 323–324, reprinted in 1977 U.S.C.C.A.N. 1402–03. Here, the scope and effect of this rulemaking extends to numerous judicial circuits because the action on the petition extends to states throughout the country. In these circumstances, section 307(b)(1) and its legislative history authorize the Administrator to find the rule to be of "nationwide scope or effect" and thus to indicate that venue for challenges to be in the D.C. Circuit. Thus, any petitions for review must be filed in the Court of Appeals for the District of Columbia Circuit. Accordingly, the EPA is proposing to determine that this will be a rulemaking of nationwide scope or effect.

In addition, pursuant to CAA section 307(d)(1)(V), the EPA is determining that this rulemaking action will be subject to the requirements of section 307(d).

[202] *See, e.g., State of Texas, et al.* v. *EPA*, 2011 U.S. App. LEXIS 5654 (5th Cir. 2011) (finding SIP call to 13 states to be of nationwide scope and effect and thus transferring the case to the U.S. Court of Appeals for the D.C. Circuit in accordance with CAA section 307(b)(1)).

XI. Statutory Authority

The statutory authority for this action is provided by CAA section 101 *et seq.* (42 U.S.C. 7401 *et seq.*).

List of Subjects in 40 CFR Part 52

Affirmative defense, Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Carbon monoxide, Environmental protection, Excess emissions, Greenhouse gases, Hydrofluorocarbons, Intergovernmental relations, Lead, Methane, Nitrogen dioxide, Nitrous oxide, Ozone, Particulate matter, Perfluorocarbons, Reporting and recordkeeping requirements, Startup, shutdown, and malfunction, State implementation plan, Sulfur hexafluoride, Sulfur oxides, Volatile organic compounds.

Dated: February 12, 2013.

Gina McCarthy,

Assistant Administrator.

[FR Doc. 2013–03734 Filed 2–21–13; 8:45 am]

BILLING CODE 6560–50–P

Appendix A-3

54 FR 19169

passing vessel traffic, the Coast Guard believes that the operator can maintain a schedule by adjusting the ferries' arrival times. This is a safer alternative since it limits the time when the ferries would be at the dock, which is immediately adjacent to the confined channel.

Two comments requested that the Coast Guard modify the regulations to allow a harbor tour vessel to use the new dock. The Coast Guard does not agree with this proposal.

The original permit application to the U.S. Army Corps of Engineers stated that the proposed dock would be used by the existing Elizabeth River ferries. The engineering drawings, as well as considerations of safety and local vessel traffic, were viewed expressly with those vessels in mind.

The Notice of Proposed Rulemaking also was predicated on an understanding that the existing ferries were the vessels to be used. Allowing the proposed ferry dock to be used by any or all vessels would be inconsistent with the original permit application and the scope of this rulemaking effort.

The remaining two comments agreed with the proposed rulemaking as written.

The Coast Guard also received three letters voicing support for the establishment of the ferry dock, but did not address the notice of proposed rulemaking.

Economic Assessment and Certification

These regulations are considered to be non-major under Executive Order 12291 on Federal Regulation and nonsignificant under Department of Transportation regulatory policies and procedures (44 FR 11034; February 26, 1979). The economic impact of these regulations is expected to be so minimal that a full regulatory evaluation is unnecessary. These regulations impose minimum restrictions on how the ferry will operate at the new dock being constructed at the foot of High Street, and should not have any effect on the economic viability of its operation.

Since the impact of these regulations is expected to be minimal, the Coast Guard certifies that they do not have a significant economic impact on a substantial number of small entities.

Environmental Impact

This action has been thoroughly reviewed by the Coast Guard and it has been determined to be excluded from further environmental documentation in accordance with section 2.B.2.c of Commandant Instruction (COMDTINST) M16475.1B.

Federalism Assessment

This rulemaking has been analyzed in accordance with the principles and criteria contained in Executive Order 12612 and it has been determined that this rulemaking does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Security measures, Vessels, Waterways.

Regulations

In consideration of the foregoing, the Coast Guard is amending Part 165 of Title 33, Code of Federal Regulations as follows:

1. The authority citation for Part 165 continues to read as follows:

Authority: 33 U.S.C. 1225 and 1231; 50 U.S.C. 191; 49 CFR 1.46 and 33 CFR 1.05–1(g), 6.04–1, 6.04–6 and 160.5.

2. Section 165.501 is amended by adding paragraphs (d)(11)(iv), (d)(12)(v), and (d)(13) to read as follows:

§ 165.501 Chesapeake Bay Entrance and Hampton Roads, Virginia and Adjacent Waters—Regulated Navigation Area.

* * * * *

(d) *Regulations:* * * *

(11) *Restrictions on Vessel Operations During Aircraft Carrier and Other Large Naval Vessel Transits of the Elizabeth River.* * * *

(iv) Notwithstanding paragraph (d)(11)(i) of this section, a vessel may not remain moored at the Elizabeth River Ferry dock at the foot of High Street in Portsmouth, Virginia, when the dock is within a safety zone for a naval aircraft carrier or other large naval vessel.

* * * * *

(12) *Restrictions on Vessel Operations During Liquefied Petroleum Gas Carrier Movements on the Chesapeake Bay and Elizabeth River.* * * *

(v) Notwithstanding paragraph (d)(12)(i) of this section, a vessel may not remain moored at the Elizabeth River Ferry dock at the foot of High Street in Portsmouth, Virginia, when the dock is within a safety zone for a liquefied petroleum gas carrier.

(13) Restrictions on the Use of the Elizabeth River Ferry Dock at the Foot of High Street, Portsmouth, Virginia.

(i) No vessels, other than those being operated as ferries for the Tidewater Transportation District Commission, may embark or disembark passengers or otherwise moor at the Elizabeth River Ferry dock at the foot of High Street, Portsmouth, Virginia.

(ii) Any vessel being operated for the Tidewater Transportation District Commission may not moor at the dock longer than necessary to embark passengers awaiting transportation or disembark passengers already aboard the vessel.

(iii) The matter or another authorized licensed officer must remain in the pilothouse and be prepared to get the vessel underway immediately or take other actions necessary to ensure the safety of the vessel's passengers, whenever a vessel is moored at the dock.

* * * * *

Dated: March 21, 1989.

A.D. Breed,

Rear Admiral, U.S. Coast Guard Commander, Fifth Coast Guard District.

[FR Doc. 89–10618 Filed 5–3–89; 8:45 am]

BILLING CODE 4910–14–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[FRL–3553–1]

Approval and Promulgation of Implementation Plans

In the matter of Kentucky: 401 KAR 61:020, Existing Process Operations, 401 KAR 59:010, New Process Operations, 401 KAR 50:015, Documents Incorporated by Reference, [KY–040].

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: On December 24, 1980 (45 FR 84999), EPA conditionally approved the State Implementation Plan (SIP) revisions which Kentucky developed for total suspended particulate (TSP) nonattainment areas pursuant to Part D of Title I of the Clean Air Act. On December 4, 1986 (51 FR 43742), EPA removed seven of the nine conditions attached to its approval of these revisions. EPA today is removing the remaining two conditions on the approval of Kentucky's Part D TSP SIP. The removal of these last two conditions will render Kentucky's Part D SIP for TSP fully approved. Regulation 401 KAR 50:015 is also being amended to incorporate several test methods referenced in other State and federal regulations. The EPA revised the particulate matter standard on July 1, 1987 (52 FR 24634), and eliminated the TSP ambient air quality standard. [The revised standard is expressed in term of particulate matter with a nominal diameter of 10 micrometers or less

(PM_{10}).) However, at the State's option, EPA was to continue to process TSP SIP revisions which were in process at the time the new PM_{10} standard was promulgated. In the policy published on July 1, 1987 (52 FR 24679, column 2), EPA stated that it would regard existing TSP SIP's as necessary interim particulate matter plans during the period preceding the approval of state plans specifically aimed at PM_{10}.

EFFECTIVE DATE: This action will be effective July 3, 1989 unless notice is received within 30 days that someone wishes to submit adverse or critical comments.

ADDRESSES: Copies of the State submittal and other relevant documents are available for public inspection during normal business hours at the following locations:

Public Information Reference Unit, Environmental Protection Agency, 401 M Street SW., Washington, DC 20460
U.S. Environmental Protection Agency, Air Programs Branch, 345 Courtland Street NE., Atlanta, Georgia 30365
Commonwealth of Kentucky Natural Resources and Environmental Protection Cabinet, Division of Air Pollution Control, Frankfort Office Plaza, 18 Reilly Road, Frankfort, Kentucky 40601

Comments should be addressed to Richard A. Schutt at the EPA address above.

FOR FURTHER INFORMATION CONTACT: Richard A. Schutt, U.S. Environmental Protection Agency, Region IV, Air Programs Branch, at the above address or telephone (404) 347-2864 or FTS 257-2864.

SUPPLEMENTARY INFORMATION:

Background

On March 3, 1978 (43 FR 8962 at 8996), and September 11, 1978 (43 FR 40412 at 40425), EPA designated several areas in the Commonwealth of Kentucky as nonattainment for certain national ambient air quality standards (NAAQS). Under the Clean Air Act (CAA) amendments of 1977, Kentucky was obligated to establish Part D (nonattainment) SIP revisions for its nonattainment areas. On June 15, 1979, the Kentucky Department for Natural Resources and Environmental Protection adopted the necessary SIP revisions and submitted them to EPA. EPA proposed conditional approval of Kentucky's TSP Part D SIP revisions in the November 15, 1979, **Federal Register** (44 FR 65781).

Since extensive comments were received in response to the November 15, 1979, notice, EPA presented its position in the September 18, 1980, **Federal Register** (45 FR 62163), Reproposal and Reopening of Comment Period for Kentucky's Particulate Part D Plan Revisions. In that notice, EPA: (1) Responded to comments received in response to the November 15, 1979, notice that related directly to deficiencies found to exist in Kentucky's TSP plan revisions; (2) clarified those deficiencies noted in the November 15, 1979, notice; and (3) described additional deficiencies discovered in the Kentucky revision after publication of the November 15, 1979, notice. On December 24, 1980, EPA conditionally approved Kentucky's SIP revisions developed for TSP nonattainment areas pursuant to Part D of Title I of the Clean Air Act, addressing all comments received in response to the September 18, 1980, proposal notice.

Nine conditions were specified in the December 24, 1980, notice as conditions for full EPA approval of Kentucky's plan. Seven of those nine conditions were proposed to be removed in the October 16, 1985, **Federal Register** notice. No comments were received in response to that proposal. Removal of seven of the nine approval conditions was published as a final rule in the December 4, 1986, **Federal Register** notice. The remaining two conditions are being removed today.

Remaining Conditions

The first of the two remaining conditions specifies that Kentucky should revise Regulation 401 KAR 50:055, Section 2(3), to specify a method other than Method 9 of Appendix A, 40 CFR Part 60, for determining opacity for sources with intermittent emissions. The State attempted to meet this condition by revising the following regulations: 401 KAR 61:075, Steel Plants Using Existing Electric Arc Furnaces; 401 KAR 61:080, Steel Plants Using Existing Basic Oxygen Process Furnaces; 401 KAR 61:140, Existing By-Product Coke Manufacturing Plants; and 401 KAR 60:020, Existing Process Operations. The State also developed 401 KAR 61:170, Existing Blast Furnace Casthouses to meet this condition. While these applicable iron/steel industry regulations satisfy this condition for the iron/steel industry, the intent of this condition was to require Kentucky to adopt appropriate opacity determining procedures for all intermittent source types for which Method 9 was inappropriate. The applicable iron/steel regulations were proposed for approval in the October 16, 1985, **Federal Register** notice. Final approval was published in the December 4, 1986, **Federal Register** notice. Kentucky attempted to satisfy this approval condition for other source types by revising Regulation 401 KAR 61:020 at Section 4(6) as follows: "(6) For intermittent emissions, the method to determine opacity shall be a method promulgated by U.S. EPA and subsequently adopted by the Department pursuant to the requirements of KRS Chapter 13." This commitment did not satisfy the present requirement for Reasonably Available Control Technology (RACT) in nonattainment areas. Therefore, action on this condition was deferred until today.

The regulatory changes being approved today to 401 KAR 61:020, Existing Process Operations, are designed to ensure that RACT is installed and consistently maintained in all particulate nonattainment areas. The provisions of 401 KAR 61:020 as amended which apply to existing affected facilities or sources located in nonattainment areas apply to those affected facilities or sources if the area's attainment status changes unless a State Implementation Plan which provides for alternate provisions is approved by EPA. Regulation 401 KAR 61:020, Section 2, Definitions, is amended by adding definitions of both "continuous emissions" and "intermittent emissions" as well as specifying test methods to be used for measuring opacity for the two types of emissions. While Reference Method 9 will still be used to determine opacity of continuous emissions, Kentucky Method 150(F-1) will now be used to measure opacity of intermittent emissions. Regulation 401 KAR 61:020, Section 4, Test Methods and Procedures, is amended by adding Kentucky Method 150(F-1). This method is filed by reference in the current revisions to 401 KAR 50:015 which are being proposed for approval today. Specifically, this test method will require that opacity readings taken every fifteen seconds for three minutes, rather than six minutes, be averaged if the emission being observed persists for less than, or equal to, twelve consecutive observations. Therefore, 401 KAR 61:020, Existing Process Operations, does, in its current amended form, satisfy approval condition (i) on Kentucky's Part D TSP SIP. Since this condition is now satisfied, EPA is removing it. Kentucky has also amended Regulation 401 KAR 59:010 to incorporate the same requirements for new sources as 61:020 does for existing sources. EPA also is approving 59:010.

The second of the two remaining approval conditions specifies that Kentucky should revise Regulation 401 KAR 61:020, Existing Process Operations, Section 3, Standard for Particulate Matter, such that the

egulation has a specific requirement of reasonably available control technology (RACT) applicable to sources of process fugitive emissions. The State attempted to meet this condition by revising 401 KAR 61:020 at Section 3(2)(c) to read as follows: "(c) Fugitive emissions of particulate matter from any affected facility located in any area designated nonattainment for particulate matter under 401 KAR 51:010 shall be subject to reasonably available control technology requirements as set forth in conditions appearing on the operating permit." EPA determined in the October 16, 1985, Federal Register notice that the State's revision to 401 KAR 61:020 does not satisfy this approval condition. In order for this revision to satisfy the approval condition, the State would have to submit approvable (enforceable) permits to EPA for all sources that have a significant impact on the nonattainment areas. Alternatively, the State could satisfy the approval condition by revising 61:020 or adopting new regulations to provide enforceable RACT procedures in regulatory form. EPA decided in the October 16, 1985, Federal Register notice to defer action on this condition until Kentucky corrected its SIP to meet it. Action is being taken on this condition today.

Regulation 401 KAR 61:020 Section 3, Standard for Particulate Matter has been amended to prohibit any continuous or intermittent fugitive emission from equalling or exceeding twenty (20) percent opacity or remaining visible beyond the lot line of the property on which the emission originates. The opacity limitation is a tightening of the previous forty (40) percent opacity limitation. Section 3 is also amended by adding a provision stating that variation from the opacity standard will be considered by the Cabinet when case-by-case circumstances warrant consideration only if such a variance has been approved by the U.S. EPA. This amendment to 401 KAR 61:020 satisfies the condition that Kentucky have a specific requirement of RACT applicable to sources of process fugitive emissions. RACT would, in this case, be defined as those control techniques and equipment necessary to meet the twenty (20) percent opacity standard. Therefore, EPA is removing this second approval condition, condition (v).

Effect of Removal of Conditions

The effect of the approval of Kentucky's amendments to 401 KAR 61:020, 401 KAR 59:010, and 401 KAR 50:015, is to fully approve Kentucky's Part D State Implementation Plan (SIP) as adequate to achieve and maintain the National Ambient Air Quality Standards for particulate matter.

Only with a fully approved Part D SIP can nonattainment areas which have adequate air quality data be redesignated to attainment, thereby facilitating any expansion of existing sources and the construction or modification of new sources in these areas.

Other Revisions

Regulation 401 KAR 50:015 is also being amended today to incorporate by reference the following reference methods from 40 CFR Part 60 Appendix A: Method 5E, Determination of Particulate Emissions from the Wool Fiberglass Insulation Manufacturing Industry; Method 7B, Determination of Nitrogen Oxide Emissions from Stationary Sources (Ultraviolet Spectrophotometry); and Method 16A, Determination of Total Reduced Sulfur Emissions from Stationary Sources (Impinger Technique). In addition, 401 KAR 50:015 is being amended to incorporate by reference Performance Specification 4, Specifications and test procedures for carbon monoxide continuous emission monitoring systems in stationary sources, from 40 CFR Part 60, Appendix B. The following document from the appropriate "Book of ASTM Standards" from the American Society for Testing and Materials in which the standard appears is also incorporated by reference in the current revisions to 401 KAR 50:015: D 2584–68(79), Standard Test Method for Ignition Loss of Cured Reinforced Resins. These methods and specifications are required in federal New Source Performance Standards (NSPS) which Kentucky is adopting by reference. Regulation 401 KAR 50:015 is also being amended to adopt Methods 209A and 209C from the Standard Methods for the Examination of Water and Wastewater, 15th Edition 1980, and to delete Method 209B. Method 209A will be used to determine compliance with the federal NSPS regulation for new wool fiberglass insulation manufacturing plants. Method 209C will replace Method 209B and will be used to measure total dissolved solids (TDS) in the make-up in by-product coke manufacturing plants. It differs from Method 209B in that the temperature of the drying oven is maintained at 103 °C to 105 °C, instead of 180 °C. Regulation 401 KAR 50:015 in its current amended form, is being approved today.

EPA is publishing this action without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. This action will be effective July 3, 1989, unless, within 30 days of its publication, notice is received that adverse or critical comments will be submitted.

If such notice is received, this action will be withdrawn before the effective date by publishing two subsequent notices. One notice will withdraw the final action and another will begin a new rulemaking by announcing a proposal of the action and establishing a comment period. If no such comments are received, the public is advised that this action will be effective July 3, 1989.

Final Action: EPA is today approving the revisions to 401 KAR 61:020, Existing Process Operations; 401 KAR 59:010, New Process Operations; and 401 KAR 50:015, Documents Incorporated by Reference, as discussed above. These revisions were submitted to EPA on September 19, 1986, after a public hearing to receive comments on the regulations was conducted on August 28, 1986. Approval of these amended regulations removes conditions necessary for full approval of Kentucky's Part D SIP for TSP, which previously was only conditionally approved. Kentucky now has a fully approved Part D SIP for TSP.

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 3, 1989. This action may not be challenged later in proceedings to enforce its requirements. (See Section 307(b)(2)).

Under 5 U.S.C. 605(b), I certify that this SIP revision will not have a significant economic impact on a substantial number of small entities. (See 46 FR 8709.)

The Office of Management and Budget has exempted this rule from the requirements of Section 3 of Executive Order 12291.

List of Subjects in 40 CFR Part 52

Air pollution control, Particulate matter, Intergovernmental relations, Incorporation by reference, Reporting and recordkeeping requirements.

Note: Incorporation by reference of the State Implementation Plan for Kentucky was approved by the Director of the Federal Register on July 1, 1982.

Date: March 23, 1989.

Lee A. DeHihns, III,

Action Regional Administrator.

Part 52 of Chapter I, Title 40, Code of Federal Regulations, is amended as follow:

PART 52—[AMENDED]

1. The authority citation for Part 52 continues to read as follows:

Authority: 42 U.S.C. 7401–7642.

Subpart S—Kentucky

2. Section 52.920 is amended by adding paragraph (c)(60) to read as follows:

§ 52.290 Identification of plan.

* * * * *

(c) * * *

(60) Corrections in Part D TSP SIP and other revisions submitted on September 19, 1986, by the Kentucky Department for Environmental Protection. The removal of these last two conditions renders the Kentucky's Part D SIP for TSP fully approved.

(i) Incorporation by reference.

(A) Revisions in Regulation 401 KAR—

50:015. Documents incorporated by Reference.

Section 1. Code of Federal Regulations,
Section 3. American Society for Testing and Materials,
Section 8. Kentucky Division of Air Pollution,
Section 10. American Public Health Association, and
Section 11. Availability.

59:010. New process operations.

Section 1. Applicability,
Section 2. Definitions,
Section 3. Standard for Particulate Matter, and
Section 4. Test Methods and Procedures.

61:020. Existing process operations.

Section 1. Applicability
Section 2. Definitions;
Section 3. Standard for Particulate Matter, and
Section 4. Test Methods and Procedures.

These changes were effective September 4, 1986.

(B) Letter of September 19, 1986, from the Kentucky Natural Resources and Environmental Protection Cabinet to EPA.

(ii) Other material—none.

§ 52.935 [Removed and Reserved]

3. Section 52.935, Control strategy: Particulate matter, is removed and reserved.

[FR Doc. 89-8508 Filed 5-3-89; 8:45 am]

BILLING CODE 6560-50-M

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40 CFR Part 52

[FRL-3564-7; EPA Docket No. AM051 PA]

Approval of Stack Height Declarations; Philadelphia & Allegheny County, Pennsylvania

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final Notice of Approval of Stack Height Declarations.

SUMMARY: EPA is approving the declarations by Philadelphia and Allegheny County in Pennsylvania that there are no source emission limits which need to be revised because of the good engineering practice (GEP) stack height regulations.

EFFECTIVE DATE: This approval will become effective on June 5, 1989.

ADDRESSES: Copies of the documentation supporting the declarations are available for public inspection during normal business hours at: U.S. Environmental Protection Agency, Region III, Air Management Division, 841 Chestnut Building, Philadelphia, PA 19107, Attn: Joseph Kunz (3AM11).

FOR FURTHER INFORMATION CONTACT: Mr. Denis Lohman (3AM11) at the address above or call (215) 597-8375.

SUPPLEMENTARY INFORMATION: On January 26, 1988 (53 FR 2086), EPA published a Notice proposing to approve the declarations by Philadelphia and Allegheny County concerning emission limitations affected by dispersion techniques. Following the promulgation of the revised stack height regulations on July 8, 1985 (50 FR 27892), all states were required to review all existing emission limitations to determine which, if any, were affected by prohibited dispersion techniques. The January 26, 1988, Notice invited public comment on the declarations that there were no affected sources in Philadelphia or Allegheny County. No comments in response to that invitation were received.

Stack Height Remand

The EPA's stack height regulations were challenged in NRDC v. Thomas, 838 F.2d 1224 (D.C. Cir. 1988). On January 22, 1988, the U.S. Court of Appeals for the D.C. Circuit issued its decision affirming the regulations in large part, but remanding three provisions to the EPA for reconsideration. These are:

1. Grandfathering pre-October 11, 1983 within-formula stack height increases from demonstration requirements [40 CFR-51.100(kk)(2)];
2. Dispersion credit for sources originally designed and constructed with merged or multiflue stacks [40 CFR 51.100(hh)(2)(ii)(A)]; and
3. Grandfathering pre-1979 use of the refined H+1.5L formula [40 CFR 51.100(ii)(2)].

The EPA is not acting on the declaration for the Philadelphia Electric Company's Schuylkill plant and the Duquesne Light Company Phillips plant, because they currently receive credit under one of the provisions remanded to the EPA in *NRDC v. Thomas*, 838 F.2d 1224 (D.C. Cir. 1988). The Philadelphia Department of Public Health, the Allegheny County Bureau of Air Pollution Control and EPA will review the sources for compliance with any revised requirements when the EPA completes rulemaking to respond to the *NRDC* remand. No other sources in Allegheny County or Philadelphia are affected by the remand.

Conclusion: Allegheny County and Philadelphia have satisfied the requirement under Section 406 of the Clean Air Act to review sources and determine that no emission limits have been affected by prohibited dispersion techniques as defined in the July 8, 1985, stack height regulation. EPA has reviewed the declarations submitted by Allegheny County and Philadelphia and, with the exceptions of the Philadelphia Electric Schuylkill plant and the Duquesne Light Company Phillips plant identified above as affected by the remanded provisions, finds that the declarations are justified. Therefore, EPA is approving the declarations as proposed with the two exceptions.

The Office of Management and Budget has exempted this notice from the requirements of Section 3 of Executive Order 12291.

Under Section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by (60 days from date of publication). This action may not be challenged later in proceedings to enforce its requirements (see Section 307(B)(2)).

List of Subjects in 40 CFR Part 52

Air pollution control, Reporting and recordkeeping requirements, Sulfur dioxide.

Authority: 42 U.S.C. 7401-7462.

Date: April 10, 1989.

Stanley L. Laskowski,

Acting Regional Administrator.

[FR Doc. 89-10400 Filed 5-3-89; 8:45 am]

BILLING CODE 6560-50-M

Appendix A-4

KRS 224.10-100

224.10-100 Powers and duties of cabinet.

In addition to any other powers and duties vested in it by law, the cabinet shall have the authority, power, and duty to:

(1) Exercise general supervision of the administration and enforcement of this chapter, and all rules, regulations, and orders promulgated thereunder;

(2) Prepare and develop a comprehensive plan or plans related to the environment of the Commonwealth;

(3) Encourage industrial, commercial, residential, and community development which provides the best usage of land areas, maximizes environmental benefits, and minimizes the effects of less desirable environmental conditions;

(4) Develop and conduct a comprehensive program for the management of water, land, and air resources to assure their protection and balance utilization consistent with the environmental policy of the Commonwealth;

(5) Provide for the prevention, abatement, and control of all water, land, and air pollution, including but not limited to that related to particulates, pesticides, gases, dust, vapors, noise, radiation, odor, nutrients, heated liquid, or other contaminants;

(6) Provide for the control and regulation of surface coal mining and reclamation in a manner to accomplish the purposes of KRS Chapter 350;

(7) Secure necessary scientific, technical, administrative, and operational services, including laboratory facilities, by contract or otherwise;

(8) Collect and disseminate information and conduct educational and training programs relating to the protection of the environment;

(9) Appear and participate in proceedings before any federal regulatory agency involving or affecting the purposes of the cabinet;

(10) Enter and inspect any property or premises for the purpose of investigating either actual or suspected sources of pollution or contamination or for the purpose of ascertaining compliance or noncompliance with this chapter, or any regulation which may be promulgated thereunder;

(11) Conduct investigations and hold hearings and compel the attendance of witnesses and the production of accounts, books, and records by the issuance of subpoenas;

(12) Accept, receive, and administer grants or other funds or gifts from public and private agencies including the federal government for the purpose of carrying out any of the functions of the cabinet. The funds received by the cabinet shall be deposited in the State Treasury to the account of the cabinet;

(13) Request and receive the assistance of any state or municipal educational institution, experiment station, laboratory, or other agency when it is deemed necessary or beneficial by the cabinet in the performance of its duties;

(14) Advise, consult, and cooperate with other agencies of the Commonwealth, other states, the federal government, and interstate and interlocal agencies, and affected persons, groups, and industries;

(15) Formulate guides for measuring presently unidentified environmental values and relationships so they can be given appropriate consideration along with social,

economic, and technical considerations in decision making;

(16) Monitor the environment to afford more effective and efficient control practices, to identify changes and conditions in ecological systems, and to warn of emergency conditions;

(17) Adopt, modify, or repeal with the recommendation of the commission any standard, regulation, or plan specified in KRS 224.1-110(5) and (6);

(18) Issue, after hearing, orders abating activities in violation of this chapter, or the provisions of this chapter, or the regulations promulgated pursuant thereto and requiring the adoption of the remedial measures the cabinet deems necessary;

(19) Issue, continue in effect, revoke, modify, suspend, or deny under such conditions as the cabinet may prescribe and require that applications be accompanied by plans, specifications, and other information the cabinet deems necessary for the following permits:

(a) Permits to discharge into any waters of the Commonwealth, and for the installation, alteration, expansion, or operation of any sewage system; however, the cabinet may refuse to issue the permits to any person, or any partnership, corporation, etc., of which the person owns more than ten percent (10%) interest, who has improperly constructed, operated, or maintained a sewage system willfully, through negligence, or because of lack of proper knowledge or qualifications until the time that person demonstrates proper qualifications to the cabinet and provides the cabinet with a performance bond;

(b) Permits for the installation, alteration, or use of any machine, equipment, device, or other article that may cause or contribute to air pollution or is intended primarily to prevent or control the emission of air pollution; or

(c) Permits for the establishment or construction and the operation or maintenance of waste disposal sites and facilities;

(20) May establish, by regulation, a fee or schedule of fees for the cost of processing applications for permits authorized by this chapter, and for the cost of processing applications for exemptions or partial exemptions which may include but not be limited to the administrative costs of a hearing held as a result of the exemption application, except that applicants for existing or proposed publicly owned facilities shall be exempt from any charge, other than emissions fees assessed pursuant to KRS 224.20-050, and that certain nonprofit organizations shall be charged lower fees to process water discharge permits under KRS 224.16-050(5);

(21) May require for persons discharging into the waters or onto the land of the Commonwealth, by regulation, order, or permit, technological levels of treatment and effluent limitations;

(22) Require, by regulation, that any person engaged in any operation regulated pursuant to this chapter install, maintain, and use at such locations and intervals as the cabinet may prescribe any equipment, device, or test and the methodologies and procedures for the use of the equipment, device, or test to monitor the nature and amount of any substance emitted or discharged into the ambient air or waters or

land of the Commonwealth and to provide any information concerning the monitoring to the cabinet in accordance with the provisions of subsection (23) of this section;

(23) Require by regulation that any person engaged in any operation regulated pursuant to this chapter file with the cabinet reports containing information as to location, size, height, rate of emission or discharge, and composition of any substance discharged or emitted into the ambient air or into the waters or onto the land of the Commonwealth, and such other information the cabinet may require;

(24) Promulgate regulations, guidelines, and standards for waste planning and management activities, approve waste management facilities, develop and publish a comprehensive statewide plan for nonhazardous waste management which shall contain but not be limited to the provisions set forth in KRS 224.43-345, and develop and publish a comprehensive statewide plan for hazardous waste management which shall contain but not be limited to the following:

(a) A description of current hazardous waste management practices and costs, including treatment and disposal, within the Commonwealth;

(b) An inventory and description of all existing facilities where hazardous waste is being generated, treated, recycled, stored, or disposed of, including an inventory of the deficiencies of present facilities in meeting current hazardous waste management needs and a statement of the ability of present hazardous waste management facilities to comply with state and federal laws relating to hazardous waste;

(c) A description of the sources of hazardous waste affecting the Commonwealth including the types and quantities of hazardous waste currently being generated and a projection of such activities as can be expected to continue for not less than twenty (20) years into the future; and

(d) An identification and continuing evaluation of those locations within the Commonwealth which are naturally or may be engineered to be suitable for the establishment of hazardous waste management facilities, and an identification of those general characteristics, values, and attributes which would render a particular location unsuitable, consistent with the policy of minimizing land disposal and encouraging the treatment and recycling of the wastes.

The statewide waste management plans shall be developed consistent with state and federal laws relating to waste;

(25) Perform other acts necessary to carry out the duties and responsibilities described in this section;

(26) Preserve existing clean air resources while ensuring economic growth by issuing regulations, which shall be no more stringent than federal requirements, setting maximum allowable increases from stationary sources over baseline concentrations of air contaminants to prevent significant deterioration in areas meeting the state and national ambient air quality standards;

(27) Promulgate regulations concerning the bonding provisions of subsection (19)(a) of

this section, setting forth bonding requirements, including but not limited to requirements for the amount, duration, release, and forfeiture of the bonds. All funds from the forfeiture of bonds required pursuant to this section shall be placed in the State Treasury and credited to a special trust and agency account which shall not lapse. The account shall be known as the "sewage treatment system rehabilitation fund" and all moneys placed in the fund shall be used for the elimination of nuisances and hazards created by sewage systems which were improperly built, operated, or maintained, and insofar as practicable be used to correct the problems at the same site for which the bond or other sureties were originally provided;

(28) Promulgate administrative regulations not inconsistent with the provisions of law administered by the cabinet; and

(29) Through the secretary or designee of the secretary, enter into, execute, and enforce reciprocal agreements with responsible officers of other states relating to compliance with the requirements of KRS Chapters 350, 351, and 352 and the administrative regulations promulgated under those chapters.

Effective: July 15, 2014

History: Amended 2014 Ky. Acts ch. 35, sec. 1, effective July 15, 2014. -- Amended 2007 (2d Extra. Sess.) Ky. Acts ch. 1, sec. 42, effective August 30, 2007. -- Amended 1994 Ky. Acts ch. 162, sec. 3, effective July 15, 1994. -- Amended 1990 Ky. Acts ch. 325, sec. 15, effective July 13, 1990; and ch. 412, sec. 1, effective July 13, 1990. -- Amended 1986 Ky. Acts ch. 455, sec. 1, effective July 15, 1986. -- Amended 1984 Ky. Acts ch. 111, sec. 109, effective July 13, 1984. -- Amended 1980 Ky. Acts ch. 264, sec. 2; and ch. 377, sec. 10, effective July 15, 1980. -- Amended 1978 Ky. Acts ch. 113, sec. 3, effective June 17, 1978; and ch. 266, sec. 2, effective June 17, 1978. -- Amended 1974 Ky. Acts ch. 355, sec. 2, effective June 21, 1974. -- Created 1972 (1st Extra. Sess.) Ky. Acts ch. 3, sec. 3, effective January 1, 1973.

Formerly codified as KRS 224.033

Legislative Research Commission Note (6/20/2005). 2005 Ky. Acts ch. 123, sec. 5, codified at KRS 224.10-103, provides that the Division of Energy and all "personnel, functions, powers, and duties of the Division of Energy shall be transferred to the Tourism Development Cabinet." The abolition of the Tourism Development Cabinet and creation of the Commerce Cabinet under Executive Order 2004-729 were confirmed by 2005 Ky. Acts ch. 95, in which the Office of Energy Policy is established and statutory references to the "Division of Energy" are changed to the "Office of Energy Policy."

Legislative Research Commission Note (9/28/93). The Division of Energy within the Department for Natural Resources of the Natural Resources and Environmental Protection Cabinet was made "responsible for subsections (28) and (29)" of this statute by 1990 Ky. Acts, ch. 325, sec. 14.

Appendix B

401 KAR 50:055
(Current Regulation)

COMMONWEALTH OF KENTUCKY
ENERGY AND ENVIRONMENT CABINET
DEPARTMENT FOR ENVIRONMENTAL PROTECTION
Division for Air Quality

401 KAR 50:055. General compliance requirements.

RELATES TO: KRS Chapter 224

STATUTORY AUTHORITY: KRS 224.10-100

NECESSITY, FUNCTION, AND CONFORMITY: KRS 224.10-100 requires the Environmental and Public Protection Cabinet to prescribe administrative regulations for the prevention, abatement, and control of air pollution. This administrative regulation establishes requirements for compliance during shutdown and malfunctions; establishes requirements for demonstrating compliance with standards; establishes requirements for compliance when a source is relocated within the Commonwealth of Kentucky; and other general compliance requirements.

Section 1. Emissions During Shutdown and Malfunction.

(1) Emissions which, due to shutdown or malfunctions, temporarily exceed the standard set forth by the cabinet shall be deemed in violation of such standards unless the requirements of this section are satisfied and the determinations specified in subsection (4) of this section are made.

(2) When emissions during any planned shutdown and ensuing start-up will exceed the standards, the owner or operator of the source shall notify the director or his designee no later than three (3) days before the planned shutdown. However, if the shutdown is necessitated by events which the owner or operator could not reasonably have foreseen three (3) days before the shutdown, then such notification shall be given immediately following the decision to shut down. The notice shall be in writing and shall specify the name of the air contaminant source, its location, the address and telephone number of the person responsible for the source, the reasons for and duration of the proposed shutdown, the date and time for the action, the physical and chemical composition, rate and concentration of the emissions during such shutdown and ensuing start-up, the basis for determination that such shutdown is necessary, and the measures which will be taken to minimize the extent and duration of the emissions during such shutdown and ensuing start-up.

(3) When emissions due to malfunctions, unplanned shutdowns or ensuing start-ups are or may be in excess of the standards, the owner or operator shall notify the director by telephone as promptly as possible, and shall cause written notice when requested by the director to be sent to the director. Such notice shall specify the name of the source, its location, the address and telephone number of the person responsible for the source, the nature and cause of the malfunctions, or unplanned shutdown, the date and time when the malfunction was first observed, the expected duration, the nature of the action to be taken to correct the malfunction, and an estimate of the physical and chemical composition, rate and concentration of the emission.

(4) A source shall be relieved from compliance with the standards set forth by the cabinet if the director determines, upon a showing by the owner or operator of the source, that:
   (a) The malfunction or shutdown and ensuing start-up did not result from the failure by the owner or operator of the source to operate and maintain properly the equipment;
   (b) All reasonable steps were taken to correct, as expeditiously as practicable, the conditions causing the emissions to exceed the standards, including the use of off-shift labor and overtime if necessary;
   (c) All reasonable steps were taken to minimize the emissions and their effect on air quality resulting from the occurrence;
   (d) The excess emissions are not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and
   (e) The malfunction or shutdown and ensuing start-up was not caused entirely or in part by poor maintenance, careless operation or any other preventable upset conditions or equipment breakdown.

(5) The director shall notify the owner or operator of the source of the determination made under this section no later than sixty (60) days after the date that all information required by this section has been submitted.

Section 2. Compliance with Standards and Maintenance Requirements.

(1) An owner or operator of any affected facility subject to any standard within the administrative regulations of the Division for Air Quality shall:
   (a) In the case of a new source, demonstrate compliance with the applicable standard(s) within sixty (60) days after achieving the maximum production rate at which the affected facility will be operated, but not later than 180 days after initial start-up of such facility;
   (b) In the case of an existing source, demonstrate compliance with the applicable standard before or on the date that final compliance is required by the applicable compliance schedule unless otherwise specified by administrative regulation; and
   (c) Maintain the affected facility in compliance with all applicable standards at all times subsequent to the date that compliance is demonstrated.

(2) Compliance with standards in the administrative regulations of the Division for Air Quality shall be demonstrated as follows:
   (a) By performance tests as specified in the applicable administrative regulation and according to the requirements and exceptions provided in 401 KAR 50:045.
   (b) By methods other than performance tests as provided for by the applicable administrative regulation.
   (c) By methods acceptable to the cabinet if the applicable administrative regulation does not specify a performance test or other method of determining compliance.

(3) Compliance with opacity standards in the administrative regulations of the Division for Air Quality shall be determined by Method 9 of Appendix A of 40 CFR 60, filed by reference in 401 KAR 50:015, except as may be provided for by administrative regulation for a specific category of sources. Opacity readings of portions of plumes which contain condensed, uncombined water vapor shall not be used for purposes of determining compliance with opacity standards. The results of continuous monitoring by transmissometer which indicate that the opacity at the time visual observations were made was not in excess of the standard are probative but not conclusive evidence of the actual

opacity of an emission, provided that the source shall meet the burden of proving that the instrument used meets (at the time of the alleged violation), performance specification as required by the cabinet, has been properly maintained and (at the time of the alleged violation) calibrated, and that the resulting data have not been tampered with in any way.

(4) The opacity standards set forth in this administrative regulation shall apply at all times except during periods of start-up, shutdown, and as otherwise provided in the applicable standard.

(5) At all times, including periods of start-up, shutdown and malfunction, owners and operators shall, to the extent practicable, maintain and operate any affected facility including associated air pollution control equipment in a manner consistent with good air pollution control practice for minimizing emissions. Determination of whether acceptable operating and maintenance procedures are being used will be based on information available to the cabinet which may include, but is not limited to, monitoring results, opacity observations, review of operating and maintenance procedures, and inspection of the source.

(6) Adjustment of opacity standards for emissions from a stack or a control device:

(a) An owner or operator of an affected facility may request the cabinet to determine opacity of emissions from the affected facility during the initial performance tests. Fugitive emissions are not subject to the provisions of this subsection.

(b) Upon receipt from such owner or operator of the written report of the results of the performance tests, the cabinet will make a finding concerning compliance with opacity and other applicable standards. If the cabinet finds that an affected facility is in compliance with all applicable standards for which performance tests are conducted, but during the time such performance tests are being conducted fails to meet any applicable opacity standard, the cabinet shall notify the owner or operator and advise him that he may petition the cabinet within ten (10) days of receipt of notification to make appropriate adjustment to the opacity standard for the affected facility.

(c) The cabinet will grant such a petition upon a demonstration by the owner or operator that the affected facility and associated air pollution control equipment were operated and maintained in a manner to minimize the opacity of emissions during the performance tests; that the performance tests were performed under the conditions established by the cabinet; and that the affected facility and associated air pollution control equipment were incapable of being adjusted or operated to meet the applicable opacity standard.

(d) The cabinet will establish an opacity standard for the affected facility meeting the above requirements at a level at which the source will be able, as indicated by the performance and opacity tests, to meet the opacity standard at all times during which the source is meeting the mass or concentration emission standard.

Section 3. Shutdown and Relocation.

(1) Any affected facility commencing operations after a shutdown for six (6) months shall demonstrate compliance with the applicable standard(s) within sixty (60) days after achieving the maximum production rate at which the affected facility will be operated, but not later than 180 days after commencing operations.

(2) Any source located within the Commonwealth of Kentucky and moved to another location involving a change of address shall be subject to applicable administrative regulations at

the new location or to administrative regulations which were applicable at the original location, whichever is the more stringent.

Section 4. Circumvention.
No owner or operator subject to the provisions of the administrative regulations of the Division for Air Quality shall build, erect, install, or use any article, machine, equipment or process, the use of which conceals an emission which would otherwise constitute a violation of an applicable standard. Such concealment includes, but is not limited to, the use of gaseous diluents to achieve compliance with an opacity standard or with a standard which is based on the concentration of a pollutant in the gases discharged to the atmosphere.

Section 5. Prohibition of Air Pollution.
No person shall permit or cause air pollution as defined in 401 KAR 50:010 in violation of administrative regulations promulgated by the cabinet.

(5 Ky.R. 361; Am. 982; eff. 6-6-79; 8 Ky.R. 1041; eff. 9-22-82; TAm eff. 8-9-2007.)

Appendix C

401 KAR 50:055
(Strike-through Regulation)

COMMONWEALTH OF KENTUCKY
ENERGY AND ENVIRONMENT CABINET
DEPARTMENT FOR ENVIRONMENTAL PROTECTION
Division for Air Quality

401 KAR 50:055. General compliance requirements.

RELATES TO: KRS Chapter 224

STATUTORY AUTHORITY: KRS 224.10-100

NECESSITY, FUNCTION, AND CONFORMITY: KRS 224.10-100 requires the Environmental and Public Protection Cabinet to prescribe administrative regulations for the prevention, abatement, and control of air pollution. This administrative regulation establishes requirements for compliance during shutdown and malfunctions; establishes requirements for demonstrating compliance with standards; establishes requirements for compliance when a source is relocated within the Commonwealth of Kentucky; and other general compliance requirements.

Section 1. Emissions During Shutdown and Malfunction.

~~(1) Emissions which, due to shutdown or malfunctions, temporarily exceed the standard set forth by the cabinet shall be deemed in violation of such standards unless the requirements of this section are satisfied and the determinations specified in subsection (4) of this section are made.~~

(2) When emissions during any planned shutdown and ensuing start-up will exceed the standards, the owner or operator of the source shall notify the director or his designee no later than three (3) days before the planned shutdown. However, if the shutdown is necessitated by events which the owner or operator could not reasonably have foreseen three (3) days before the shutdown, then such notification shall be given immediately following the decision to shut down. The notice shall be in writing and shall specify the name of the air contaminant source, its location, the address and telephone number of the person responsible for the source, the reasons for and duration of the proposed shutdown, the date and time for the action, the physical and chemical composition, rate and concentration of the emissions during such shutdown and ensuing start-up, the basis for determination that such shutdown is necessary, and the measures which will be taken to minimize the extent and duration of the emissions during such shutdown and ensuing start-up.

(3) When emissions due to malfunctions, unplanned shutdowns or ensuing start-ups are or may be in excess of the standards, the owner or operator shall notify the director by telephone as promptly as possible, and shall cause written notice when requested by the director to be sent to the director. Such notice shall specify the name of the source, its location, the address and telephone number of the person responsible for the source, the nature and cause of the malfunctions, or unplanned shutdown, the date and time when the malfunction was first observed, the expected duration, the nature of the action to be taken to correct the malfunction, and an estimate of the physical and chemical composition, rate and concentration of the emission.

~~(4) A source shall be relieved from compliance with the standards set forth by the cabinet if the director determines, upon a showing by the owner or operator of the source, that:~~

~~(a) The malfunction or shutdown and ensuing start-up did not result from the failure by the owner or operator of the source to operate and maintain properly the equipment;~~

~~(b) All reasonable steps were taken to correct, as expeditiously as practicable, the conditions causing the emissions to exceed the standards, including the use of off-shift labor and overtime if necessary;~~

~~(c) All reasonable steps were taken to minimize the emissions and their effect on air quality resulting from the occurrence;~~

~~(d) The excess emissions are not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and~~

~~(e) The malfunction or shutdown and ensuing start-up was not caused entirely or in part by poor maintenance, careless operation or any other preventable upset conditions or equipment breakdown.~~

(5) The director shall notify the owner or operator of the source of the determination made under this section no later than sixty (60) days after the date that all information required by this section has been submitted.

Section 2. Compliance with Standards and Maintenance Requirements.

(1) An owner or operator of any affected facility subject to any standard within the administrative regulations of the Division for Air Quality shall:

(a) In the case of a new source, demonstrate compliance with the applicable standard(s) within sixty (60) days after achieving the maximum production rate at which the affected facility will be operated, but not later than 180 days after initial start-up of such facility;

(b) In the case of an existing source, demonstrate compliance with the applicable standard before or on the date that final compliance is required by the applicable compliance schedule unless otherwise specified by administrative regulation; and

(c) Maintain the affected facility in compliance with all applicable standards at all times subsequent to the date that compliance is demonstrated.

(2) Compliance with standards in the administrative regulations of the Division for Air Quality shall be demonstrated as follows:

(a) By performance tests as specified in the applicable administrative regulation and according to the requirements and exceptions provided in 401 KAR 50:045.

(b) By methods other than performance tests as provided for by the applicable administrative regulation.

(c) By methods acceptable to the cabinet if the applicable administrative regulation does not specify a performance test or other method of determining compliance.

(3) Compliance with opacity standards in the administrative regulations of the Division for Air Quality shall be determined by Method 9 of Appendix A of 40 CFR 60, filed by reference in 401 KAR 50:015, except as may be provided for by administrative regulation for a specific category of sources. Opacity readings of portions of plumes which contain condensed, uncombined water vapor shall not be used for purposes of determining compliance with opacity standards. The results of continuous monitoring by transmissometer which indicate that the opacity at the time visual observations were made was not in excess of the standard are probative but not conclusive evidence of the actual

opacity of an emission, provided that the source shall meet the burden of proving that the instrument used meets (at the time of the alleged violation), performance specification as required by the cabinet, has been properly maintained and (at the time of the alleged violation) calibrated, and that the resulting data have not been tampered with in any way.

(4) The opacity standards set forth in this administrative regulation shall apply at all times except during periods of start-up, shutdown, and as otherwise provided in the applicable standard.

(5) At all times, including periods of start-up, shutdown and malfunction, owners and operators shall, to the extent practicable, maintain and operate any affected facility including associated air pollution control equipment in a manner consistent with good air pollution control practice for minimizing emissions. Determination of whether acceptable operating and maintenance procedures are being used will be based on information available to the cabinet which may include, but is not limited to, monitoring results, opacity observations, review of operating and maintenance procedures, and inspection of the source.

(6) Adjustment of opacity standards for emissions from a stack or a control device:

(a) An owner or operator of an affected facility may request the cabinet to determine opacity of emissions from the affected facility during the initial performance tests. Fugitive emissions are not subject to the provisions of this subsection.

(b) Upon receipt from such owner or operator of the written report of the results of the performance tests, the cabinet will make a finding concerning compliance with opacity and other applicable standards. If the cabinet finds that an affected facility is in compliance with all applicable standards for which performance tests are conducted, but during the time such performance tests are being conducted fails to meet any applicable opacity standard, the cabinet shall notify the owner or operator and advise him that he may petition the cabinet within ten (10) days of receipt of notification to make appropriate adjustment to the opacity standard for the affected facility.

(c) The cabinet will grant such a petition upon a demonstration by the owner or operator that the affected facility and associated air pollution control equipment were operated and maintained in a manner to minimize the opacity of emissions during the performance tests; that the performance tests were performed under the conditions established by the cabinet; and that the affected facility and associated air pollution control equipment were incapable of being adjusted or operated to meet the applicable opacity standard.

(d) The cabinet will establish an opacity standard for the affected facility meeting the above requirements at a level at which the source will be able, as indicated by the performance and opacity tests, to meet the opacity standard at all times during which the source is meeting the mass or concentration emission standard.

Section 3. Shutdown and Relocation.

(1) Any affected facility commencing operations after a shutdown for six (6) months shall demonstrate compliance with the applicable standard(s) within sixty (60) days after achieving the maximum production rate at which the affected facility will be operated, but not later than 180 days after commencing operations.

(2) Any source located within the Commonwealth of Kentucky and moved to another location involving a change of address shall be subject to applicable administrative regulations at

the new location or to administrative regulations which were applicable at the original location, whichever is the more stringent.

Section 4. Circumvention.
No owner or operator subject to the provisions of the administrative regulations of the Division for Air Quality shall build, erect, install, or use any article, machine, equipment or process, the use of which conceals an emission which would otherwise constitute a violation of an applicable standard. Such concealment includes, but is not limited to, the use of gaseous diluents to achieve compliance with an opacity standard or with a standard which is based on the concentration of a pollutant in the gases discharged to the atmosphere.

Section 5. Prohibition of Air Pollution.
No person shall permit or cause air pollution as defined in 401 KAR 50:010 in violation of administrative regulations promulgated by the cabinet.

(5 Ky.R. 361; Am. 982; eff. 6-6-79; 8 Ky.R. 1041; eff. 9-22-82; TAm eff. 8-9-2007.)

Appendix D

Notice of Public Hearing

KENTUCKY DIVISION FOR AIR QUALITY
NOTICE OF PUBLIC HEARING
STATE IMPLEMENTATION PLAN REVISION
RELATING TO
PROVISIONS APPLYING TO EXCESS EMISSIONS
DURING PERIODS OF STARTUP, SHUTDOWN, AND MALFUNCTION

The Kentucky Energy and Environment Cabinet will conduct a public hearing on September 14, 2016, at 10:00 a.m. (EST) in Conference Room 111, 300 Sower Boulevard, Frankfort, KY 40601. This hearing is being held to receive comments on a proposed revision to Kentucky's State Implementation Plan (SIP) pertaining to the removal of provisions in 401 KAR 50:055, General requirements, relating to excess emissions during periods of startup, shutdown, and malfunction, from the Kentucky SIP.

This hearing is open to the public, and all interested persons will be given the opportunity to present testimony. The hearing will be held at the date, time and place given above. It is not necessary that the hearing be attended in order for persons to comment on the proposed submittal to EPA. To assure that all comments are accurately recorded, the Division requests that oral comments presented at the hearing also be provided in written form, if possible. To be considered part of the hearing record, written comments must be received by the close of the hearing on September 14, 2016. Written comments should be sent to the contact person.

The full text of the proposed SIP revision is available for public inspection and copying during regular business hours (8:00 a.m. to 4:30 p.m.) at the Division for Air Quality, 300 Sower Boulevard, Frankfort, Kentucky 40601. Any individual requiring copies may submit a request to the Division for Air Quality in writing, by telephone, or by fax. Requests for copies should be directed to the contact person. In addition, an electronic version of the proposed SIP revision document and relevant attachments can be downloaded from the Division for Air Quality's website at:

http://air.ky.gov/Pages/PublicNoticesandHearings.aspx.

The hearing facility is accessible to people with disabilities. An interpreter or other auxiliary aid or service will be provided upon request. Please direct these requests to the contact person.

CONTACT PERSON: Leslie Poff, Environmental Control Supervisor, Evaluation Section, Division for Air Quality, 300 Sower Boulevard, Frankfort, Kentucky 40601. Phone: (502) 782-6735; E-mail: lesliem.poff@ky.gov; Fax: (502) 564-4245.

The Energy and Environment Cabinet does not discriminate on the basis of race, color, national origin, sex, age, religion, or disability and provides, upon request, reasonable accommodation including auxiliary aids and services necessary to afford an individual with a disability an equal opportunity to participate in all services, programs, and activities.

COMMONWEALTH OF KENTUCKY
KENTUCKY DIVISION FOR AIR QUALITY

RE: Startup, Shutdown and Malfunction Public Hearing
401 KAR 50:055

A P P E A R A N C E S

Ms. Leslie Poff
Evaluation Section
Division for Air Quality
300 Sower Boulevard Building
Frankfort, KY 40601

September 14, 2016

TOOLE COURT REPORTERS
109 SPRUCE DRIVE, FRANKFORT, KENTUCKY 40601
PHONE 1-502-227-4955
FAX 1-502-227-7130
E-MAIL: CURTISCTRP@AOL.COM

COMMONWEALTH OF KENTUCKY
KENTUCKY DIVISION FOR AIR QUALITY

RE: Startup, Shutdown and Malfunction Public Hearing
401 KAR 50:055

Pursuant to notice duly given, the above styled matter came on to be heard at 10:00 A.M., on September 14, 2016, at 300 Sower Boulevard, Frankfort, Kentucky.

TOOLE COURT REPORTERS
109 SPRUCE DRIVE, FRANKFORT, KENTUCKY 40601
PHONE 1-502-227-4955
FAX 1-502-227-7130
E-MAIL: CURTISCTRP@AOL.COM

MODERATOR:

Okay. Today is September 14th, 2016, it's 10:01 A.M.

My name is Leslie Poff with the Division for Air Quality Evaluation Section.

As your moderator, I declare this public hearing in session.

The Division asks that everyone attending today's public hearing provide all information requested on the sign in sheets at each entrance door on the table.

This is a non-adversarial hearing, so the Division will not respond to comments or questions regarding the proposed actions. And, individuals who present testimony will not be questioned by anyone attending this hearing. A Division representative may, however, ask questions in order to clarify the meaning or intent of a comment.

All comments received in an appropriate format by the close of comment period will receive equal consideration and every individual who submits comments will receive a copy of the statement of consideration.

Melody Curtis to my right is recording today's hearing. Anyone interested in obtaining a copy of the transcript should contact Ms. Curtis.

Are there any questions?

All right. Today's hearing is being conducted in order to receive comments on a proposed revision to Kentucky State Implementation Plan pertaining to the removal of provisions in 401 KAR 50:055, general requirements relating to excess emission during periods of startup, shutdown and malfunction.

Let me see if there's any comments? There is one with written comments today, but there are no testimonies. Did--the comment, the one that was written, want to present it? No? Okay.

All right. We'll just give it ten minutes to see if anyone else comes in and then we'll take it from there.

We'll go on a ten minute break right now. It is 10:02 A.M.

OFF THE RECORD

MODERATOR:

All right. It is now 10:10, the hearing

record is reopened.

Are there any late arrivals who would like to present testimony?

All right. In the absence of any testimony, the public hearing is adjourned.

STATE OF KENTUCKY)
)
COUNTY OF FRANKLIN)

I, Melody Curtis, a Notary Public in and for the state and county aforesaid, do hereby certify that the foregoing hearing was taken by me at the time and place and for the purpose stated in the caption; that said proceeding was taken down in shorthand writing by me and later transcribed to the best of my ability.

The foregoing typewritten material constitutes a true and correct record of all proceedings taken by me in the above styled matter.

WITNESS my hand and notarial seal this 24th day of September, 2016.

Melody Curtis

Notary Public
State of Kentucky at Large
VCC20041025
Notary ID No. 559294

My commission expires: 6/20/2020

Appendix E

Response to Comments

Response to Comments

In accordance with 40 CFR 51.102, the Cabinet provided the public an opportunity to request a public hearing and submit written comments on the proposed State Implementation Plan (SIP) submittal relating to provisions applying to excess emissions during periods of startup, shutdown, and malfunction. A notice including the date, location and time of the scheduled public hearing was distributed to all contacts registered on Department for Environmental Protection's RegWatch list and posted on the Division for Air Quality website on August 15, 2016. A 30 day public comment period was provided to all individuals interested in submitting comments. The public hearing was held on September 14, 2016 at 10:00 a.m. and the Energy and Environment Cabinet office located at 300 Sower Boulevard, Frankfort KY.

During the public comment period, written comments were received from the following three entities: (1) R. Scott Davis, Chief, Air Planning and Implementation Branch, U.S. EPA; (2) David Darling, Managing Director, Environmental, Health, and Safety Affair, American Coatings Association (ACA); and (3) Kevin Frizzell, Chair, Utility Information Exchange of Kentucky (UIEK). The comments and responses are listed below.

Response to Comments for the proposed SIP revision relating to provisions applying to excess emissions during periods of startup, shutdown, and malfunction.

1. **Comment:** *We have completed our preliminary review of the prehearing package and have no comments.*
(R. Scott Davis, U.S. EPA)

Response: The Division acknowledges this comment.

2. **Comment:** "*It is our understanding that Kentucky is proposing to modify the Section 401 KAR 50:055 by deleting Section (4) as follows:*

(4) A source shall be relieved from compliance with the standards set forth by the cabinet if the director determines, upon a showing by the owner or operator of the source, that:
(a) The malfunction or shutdown and ensuing start-up did not result from the failure by the owner or operator of the source to operate and maintain properly the equipment;
(b) All reasonable steps were taken to correct, as expeditiously as practicable, the conditions causing the emissions to exceed the standards, including the use of off-shift labor and overtime if necessary;
(c) All reasonable steps were taken to minimize the emissions and their effect on air quality resulting from the occurrence;
(d) The excess emissions are not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and
(e) The malfunction or shutdown and ensuing start-up was not caused entirely or in part by poor maintenance, careless operation or any other preventable upset conditions or equipment breakdown."
(*David Darling, ACA*)

Response: The Division acknowledges this comment. The Division would like to clarify that this proposed SIP revision is not amending 401 KAR 50:055. The proposed SIP revision is to remove Sections 1(1) and 1(4) of 401 KAR 50:055 from the Kentucky SIP, making those provisions enforceable as state-only provisions.

3. Comment: "*The SSM provisions in Section (4) impose work practice, operational standards, or general guidelines to minimize emissions to the greatest extent practicable when the use of pollution control devices is not practically feasible. Removing affirmative defense provisions from Section (4) will not reduce emissions, it will merely subject sources unfairly to penalties for exceedances that the sources could not reasonably have avoided."*
(*David Darling, ACA*)

Response: The Division acknowledges this comment. The Division would like to clarify that this proposed SIP revision is not amending 401 KAR 50:055. The proposed SIP revision is to remove Sections 1(1) and 1(4) of 401 KAR 50:055 from the Kentucky SIP only, making those provisions enforceable as state-only provisions.

4. Comment: "*While ACA understands that EPA has requested Kentucky remove Section (4) provisions from a "Federal" permit perspective, we suggest that Kentucky retain the Section (4) provisions from a "State" permit perspective."*
(*David Darling, ACA*)

Response: The Division acknowledges this comment. The Division would like to clarify that this proposed SIP revision is not amending 401 KAR 50:055. The proposed SIP revision is to remove Sections 1(1) and 1(4) of 401 KAR 50:055 from the Kentucky SIP only, making those provisions enforceable as state-only provisions.

5. Comment: "*ACA therefore suggests that Kentucky retain Section (4) however clarify this section pertains only to State permits and enforcement."*
(*David Darling, ACA*)

Response: The Division acknowledges this comment. The Division would like to clarify that this proposed SIP revision is not amending 401 KAR 50:055. The proposed SIP revision is to remove Sections 1(1) and 1(4) of 401 KAR 50:055 from the Kentucky SIP, making those provisions enforceable as state-only provisions.

6. Comment: "*The UIEK disagrees with U.S. EPA's finding that the Kentucky State Implementation Plan is substantially inadequate and supports the Kentucky Division for Air Quality's continued assertion that its current regulations are adequate to enforce compliance with the Clean Air Act."*
(*Kevin Frizzell, UIEK*)

Response: The Division acknowledges this comment.

7. Comment: *"The UIEK prefers the Division simultaneously propose common revisions to its regulations for the EGU source category as part of the SIP revision outlining the philosophy that compliance with MATS work practice standards during startup and shutdown is an acceptable alternative to meeting numeric emission standards at such times."*
(*Kevin Frizzell, UIEK*)

Response: The Division acknowledges this comment. The SSM "SIP Call" issued by U.S. EPA is limited in scope. The proposed SIP revision addresses only those specific regulatory provisions identified by U.S. EPA in the SSM "SIP Call." Due to the deadline of responding to the SSM "SIP Call", the Division is unable to simultaneously propose further revisions to the Kentucky SIP.

8. Comment: "*However, the UIEK understands the time constraints and understands the Division is working towards such an alternative. With that understanding, the UIEK supports the currently proposed SIP revision as an interim measure to address the SIP Call by the federally imposed deadline."*
(*Kevin Frizzell, UIEK*)

Response: The Division acknowledges this comment.

9. Comment: "*As a solution to the issue for the EGU source category, the UIEK proposes the following language from items 3 and 4 of Table 3 within the MATS rule be applied to 401 KAR 59:015 and 401 KAR 61:015 as alternate limitations during periods of startup and shutdown."*
(*Kevin Frizzell, UIEK*)

Response: The Division acknowledges this comment. The SSM "SIP Call" issued by U.S. EPA is limited in scope, specifically identifying 401 KAR 50:055, Section 1(1) only as "substantially inadequate." The proposed SIP revision addresses only those specific regulatory provisions identified by U.S. EPA in the SSM "SIP Call" as part of the proposed SIP revision.

10. Comment: "*The UIEK understands that the Division is considering various actions with respect to 401 KAR 50:055 specifically in response to the SIP Call. The UIEK supports retention of the provisions of Section 1 as a state regulation <u>in lieu</u> of amending subsections (1) and (4) to allow the regulation to be retained as part of the SIP."*
(*Kevin Frizzell, UIEK*)

Response: The Division acknowledges this comment.

11. Comment: "*The UIEK proposes that the Division respond to the SIP Call by: (1) establishing source category specific provisions for startup and shutdown for EGUs and (2) retaining 401 KAR 50:055 in its current form but as a "state-only" regulation."*
(*Kevin Frizzell, UIEK*)

Response: The Division acknowledges this comment. The SSM "SIP Call" issued by U.S. EPA is limited in scope, specifically identifying 401 KAR 50:055, Section 1(1) only as "substantially inadequate." The proposed SIP revision addresses only those specific regulatory provisions identified by U.S. EPA in the SSM "SIP Call" as part of the proposed SIP revision.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

September 7, 2016

Sean Alteri, Director
Kentucky Division for Air Quality
300 Sower Blvd, 2nd Floor
Frankfort, Kentucky 40601-6571

Dear Mr. Alteri:

Thank you for your email dated August 12, 2016, transmitting a prehearing package regarding Kentucky's removal from the State Implementation Plan, provisions relating to excess missions during periods of startup, shutdown, and malfunction. We understand that written comments are due by the close of business on September 14, 2016. We have completed our preliminary review of the prehearing package and have no comments.

We look forward to continuing to work with you and your staff. If you have any questions, please contact Ms. Lynorae Benjamin, Chief, Air Regulatory Management Section at (404) 562-9040, or have your staff contact Mr. Zuri Farngalo at 404-562-9152.

Sincerely,

R. Scott Davis
Chief
Air Planning and Implementation Branch

AmericanCoatings
ASSOCIATION℠

September 9, 2016

Leslie Poff
Environmental Control Supervisor, Evaluation Section
Division for Air Quality
300 Sower Boulevard
Frankfort, Kentucky 40601

Re: Comments on Proposed State Implementation Plan Revision Relating to Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction

Dear Ms. Poff:

The American Coatings Association (ACA)[1] and the Kentucky Paint Council appreciate the opportunity to submit comments on the Proposed State Implementation Plan Revision Relating to Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction. It is our understanding that Kentucky is proposing to modify Section 401 KAR 50:055 by deleting Section (4) as follows:

(4) A source shall be relieved from compliance with the standards set forth by the cabinet if the director determines, upon a showing by the owner or operator of the source, that:
(a) The malfunction or shutdown and ensuing start-up did not result from the failure by the owner or operator of the source to operate and maintain properly the equipment;
(b) All reasonable steps were taken to correct, as expeditiously as practicable, the conditions causing the emissions to exceed the standards, including the use of off-shift labor and overtime if necessary;
(c) All reasonable steps were taken to minimize the emissions and their effect on air quality resulting from the occurrence;
(d) The excess emissions are not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and
(e) The malfunction or shutdown and ensuing start-up was not caused entirely or in part by poor maintenance, careless operation or any other preventable upset conditions or equipment breakdown.

The SSM provisions in Section (4) impose work practice, operational standards, or general guidelines to minimize emissions to the greatest extent practicable when the use of pollution control devices is not practically feasible. Removing affirmative defense provisions from Section

[1] The American Coatings Association (ACA) is a voluntary, nonprofit trade association working to advance the needs of the paint and coatings industry and the professionals who work in it. The organization represents paint and coatings manufacturers, raw materials suppliers, distributors, and technical professionals. ACA serves as an advocate and ally for members on legislative, regulatory and judicial issues, and provides forums for the advancement and promotion of the industry through educational and professional development services.

(4) will not reduce emissions, it will merely subject sources unfairly to penalties for exceedances that the sources could not reasonably have avoided.

While ACA understands that EPA has requested Kentucky remove Section (4) provisions from a "Federal" permit perspective, we suggest that Kentucky retain the Section (4) provisions from a "State" permit perspective. We believe that EPA would allow this revision given the recent proposed rule language from the Tuesday, June 14, 2016 EPA Proposed Rule - Removal of Title V Emergency Affirmative Defense Provisions from State Operating Permit Programs and Federal Operating Permit Program; Docket ID No. EPA-HQ-OAR-2016-0186, page 38652:

"Although the EPA expects that most states would elect to remove the emergency affirmative defense provisions from their part 70 program regulations, states could nonetheless choose to retain such affirmative defense provisions within their permitting regulations as state-only requirements in certain circumstances."

ACA therefore suggests that Kentucky retain Section (4) however clarify this section pertains only to State permits and enforcement.

Please contact me if you have any questions

/s/

David Darling
Managing Director, Environmental, Health and Safety Affair

Sent via email

September 13, 2016

Leslie Poff, Environmental Control Supervisor Evaluation Section
Kentucky Division for Air Quality
300 Sower Boulevard, Second Floor
Frankfort, Kentucky 40601

RE: Proposed Revision to Kentucky SIP Relating to 401 KAR 50:055

Dear Ms. Poff:

The Utility Information Exchange of Kentucky (UIEK) submits the following comments on the proposed revision to Kentucky's State Implementation Plan (SIP) pertaining to the removal of provisions in 401 KAR 50:055, General requirements, relating to excess emissions during periods of startup, shutdown, and malfunction.

The UIEK disagrees with U.S. EPA's finding that the Kentucky State Implementation Plan is substantially inadequate and supports the Kentucky Division for Air Quality's continued assertion that its current regulations are adequate to enforce compliance with the Clean Air Act.

Nonetheless, the UIEK understands that U.S. EPA has issued a SIP Call requiring the Division to submit revisions related to 401 KAR 50:055, Section 1. Although litigation is pending, it is our understanding the deadline for the state's response to the SIP call remains November 22, 2016.

Accordingly, as the current Chair of UIEK, I am transmitting the enclosed UIEK Position Statement. In addition to the enclosed Position Statement, UIEK calls your attention to the proposed revisions of the Mississippi regulation that is the subject of the SIP call, a copy of which is also enclosed. The proposal was obtained from the Mississippi Department of Environmental Quality. Positive aspects of the proposal that UIEK members noted were:

- The ability to establish alternative emission limits in the form of work practices on a case-by-case basis. These standards would be implemented in the source's federally enforceable permits. Those permit provisions could also be included in the Mississippi SIP if necessary.
- In the event the states' challenges to the EPA SIP call are upheld, Mississippi would revert back to its original rule.
- Similar to UIEK's Position Statement, compliance with MATS work practice standards during startup and shutdown would be an acceptable alternative to meeting numeric emission standards at such times.

The UIEK prefers the Division simultaneously propose common revisions to its regulations for the EGU source category as part of the SIP revision outlining the philosophy that compliance with MATS work practice standards during startup and shutdown is an acceptable alternative to meeting numeric emission standards at such times. However, the UIEK understands the time constraints and understands the Division is working towards such an alternative. With that understanding, the UIEK supports the currently proposed SIP revision as an interim measure to address the SIP Call by the federally imposed deadline.

Sincerely,

Kevin Frizzell,
Chair, UIEK

UTILITY INFORMATION EXCHANGE OF KENTUCKY
POSITION STATEMENT STARTUP/SHUTDOWN REQUIREMENTS FOR PENDING SSM SIP CALL
SEPTEMBER 12, 2016

The Utility Information Exchange of Kentucky (UIEK) appreciates the opportunity to provide input to the Kentucky Division for Air Quality (Division) regarding the UIEK's suggested source category approach for addressing the Startup Shutdown Malfunction (SSM) SIP call issued to Kentucky by the EPA. Following a brief discussion of the SIP call, the UIEK presents the following justification and proposed regulatory amendments for the Division's consideration. As EPA itself recognized in the Mercury and Air Toxics Standards (MATS) rulemaking, it is difficult for the electric generating source category to meet numeric emission limits during startup and shutdown events and that alternative emission limits in the form of work practice standards are appropriate.

THE SIP CALL

In a final rule published in the June 12, 2015 Federal Register (80 Fed. Reg. 33840), EPA granted a petition for rulemaking that had been filed by the Sierra Club regarding SSM provisions in multiple SIPs. The SIP provisions had previously been approved by EPA. With respect to Kentucky specifically, EPA granted the petition with respect to 401 KAR 50:055, Section 1, stating: "Accordingly, the EPA is finding that this provision is substantially inadequate to meet CAA requirements and the EPA is thus issuing a SIP call with respect to this provision." 80 Fed. Reg. at 33963. Kentucky and other states have challenged EPA's determination and that litigation is pending. However, according to EPA's final rule, the deadline for a response to the SIP call is November 22, 2016.

MATS

EPA recognized in MATS that numeric emission limitations are not appropriate during periods of startup and shutdown and instead established "work practice standards" (WPS) that apply during those periods.

When it proposed MATS, EPA had numeric emission limits that applied at all times including periods of startup and shutdown. EPA attempted to resolve the concerns about the varying conditions that occur during startup and shutdown by including the use of default diluent values and standard electrical production rates to be utilized in calculation of emission rates during these periods. However, in the final rule, EPA recognized that they had insufficient quality assured data collected from the utility industry during the Agency's massive Information Collection Request (ICR) in development of the rule on which to properly establish a numeric limit during startup and shutdown conditions. See Attachment 1, excerpt from MATS

preamble. Considering this, EPA deemed establishment of numerical emission limitations to be inappropriate for these periods and instead, implemented work practice standards that apply during the entire defined startup and shutdown periods.

F-Factor Methodology

As required by regulation, a utility must utilize the F-factor methodology found in EPA Method 19 to correct emission rates to the units of the appropriate standard. Therefore, if an emission limitation was established that would apply at all times including periods of startup and shutdown, utilities would be required to utilize this methodology to calculate emission rates. The UIEK contends that during periods of startup and shutdown, this methodology would not result in an accurate estimate of emission rates. The F-factors from EPA Method 19 were developed under normal load conditions. As has been noted in the promulgation of other regulations targeted at utilities, specifically MATS, there are no "normal" conditions that exist during periods of startup and shutdown. The conditions vary widely during these periods. Specifically, gas volumes, temperatures and oxygen concentrations are varying greatly and some of these are key components in determining F-factor values. As a result, the utilization of F-factors from EPA Method 19 would produce emission rates that are not representative of actual emissions.

NAAQS

The UIEK is unaware of any excursions of the NAAQS that have been attributed to emissions from startup and shutdown events at member facilities. It is important to recognize that sources have been complying with the requirements of 401 KAR 50:055 for many years, including use of good operation and maintenance practices. Compliance with work practice standards during periods of startup and shutdown will not jeopardize the NAAQS.

PROPOSED REGULATORY ACTIONS

Source Category Specific WPS

As a solution to the issue for the EGU source category, the UIEK proposes the following language from items 3 and 4 of Table 3 within the MATS rule be applied to 401 KAR 59:015 and 401 KAR 61:015 as alternate limitations during periods of startup and shutdown. These requirements limit applicable regulated EGU pollutants in addition to limiting hazardous air pollutants.

> (a) You must be in compliance with the emission limits and operating limits at all times. However, for coal-fired, liquid oil-fired, or solid oil-derived fuel-fired EGU, you are required to meet the work practice requirements as prescribed in Items 3 and 4 of Table 3 to 40 CFR Part 63 Subpart UUUUU during periods of startup or shutdown.
>
> (b) At all times you must operate and maintain any affected source, including associated air pollution control equipment and monitoring equipment, in a manner consistent with safety and

good air pollution control practices for minimizing emissions. Determination of whether such operation and maintenance procedures are being used will be based on information available to the Cabinet which may include, but is not limited to, monitoring results, review of operation and maintenance procedures, review of operation and maintenance records, and inspection of the source.

(1) You must determine the fuel whose combustion produces the least uncontrolled emissions, i.e., the cleanest fuel, either natural gas or distillate oil, that is available on site or accessible nearby for use during periods of startup or shutdown.

(2) Your cleanest fuel, either natural gas or distillate oil, for use during periods of startup or shutdown determination may take safety considerations into account.

A copy of items 3 & 4 of Table 3 is provided in Attachment 2.

This approach is consistent with the EPA Region 4 comments on Georgia's proposed regulatory changes in response to the SIP Call where EPA stated in Comment 9:

> To adopt federal rule SSM provisions into the SIP, EPA suggests that a state's rule include in the SIP provision the relevant language from the federal rule that serves as the applicable limitation during startup/shutdown. Alternatively, the SIP could include reference to the specific applicable provisions. For example, the rule might provide that steam generating units ... shall, during periods of startup and shutdown, comply with the applicable work practice standards specified in Table 3 to 40 CFR 63 Subpart UUUUU. Such provision should also specify the version of the CFR (i.e., the "as of" date).

Retention of 401 KAR 50:055 as a "State-Only" Requirement

The UIEK understands that the Division is considering various actions with respect to 401 KAR 50:055 specifically in response to the SIP Call. The UIEK supports retention of the provisions of Section 1 as a state regulation in lieu of amending subsections (1) and (4) to allow the regulation to be retained as part of the SIP.

CONCLUSION

The UIEK proposes that the Division respond to the SIP Call by: (1) establishing source category specific provisions for startup and shutdown for EGUs and (2) retaining 401 KAR 50:055 in its current form but as a "state-only" regulation. The proposed approach is supported by the EPA's own regulatory determinations in development of the MATS. This approach would establish source category specific WPS for startup and shutdown, rather than general WPS

which EPA found objectionable when reviewing the Georgia proposed regulation. The provisions can be added to the existing regulations 401 KAR 59:015 and 401 KAR 61:015. The UIEK appreciates your consideration of this proposal and would be glad to work with the Division on implementation of this proposal.

ATTACHMENT 2

ITEMS 3 AND 4 FROM TABLE 3 TO SUBPART UUUUU OF PART 63—WORK PRACTICE STANDARDS

3. A coal-fired, liquid oil-fired (excluding limited-use liquid oil-fired subcategory units), or solid oil-derived fuel-fired EGU during startup	a. You have the option of complying using either of the following work practice standards: (1) If you choose to comply using paragraph (1) of the definition of "startup" in §63.10042, you must operate all CMS during startup. Startup means either the first-ever firing of fuel in a boiler for the purpose of producing electricity, or the firing of fuel in a boiler after a shutdown event for any purpose. Startup ends when any of the steam from the boiler is used to generate electricity for sale over the grid or for any other purpose (including on site use). For startup of a unit, you must use clean fuels as defined in §63.10042 for ignition. Once you convert to firing coal, residual oil, or solid oil-derived fuel, you must engage all of the applicable control technologies except dry scrubber and SCR. You must start your dry scrubber and SCR systems, if present, appropriately to comply with relevant standards applicable during normal operation. You must comply with all applicable emissions limits at all times except for periods that meet the applicable definitions of startup and shutdown in this subpart. You must keep records during startup periods. You must provide reports concerning activities and startup periods, as specified in §63.10011(g) and §63.10021(h) and (i).
	(2) If you choose to comply using paragraph (2) of the definition of "startup" in §63.10042, you must operate all CMS during startup. You must also collect appropriate data, and you must calculate the pollutant emission rate for each hour of startup.
	For startup of an EGU, you must use one or a combination of the clean fuels defined in §63.10042 to the maximum extent possible, taking into account considerations such as boiler or control device integrity, throughout the startup period. You must have sufficient clean fuel capacity to engage and operate your PM control device within one hour of adding coal, residual oil, or solid oil-derived fuel to the unit. You must meet the startup period work practice requirements as identified in §63.10020(e).
	Once you start firing coal, residual oil, or solid oil-derived fuel, you must vent emissions to the main stack(s). You must comply with the applicable emission limits beginning with the hour after startup ends. You must engage and operate your particulate matter control(s) within 1 hour of first firing of coal, residual oil, or solid oil-derived fuel.
	You must start all other applicable control devices as expeditiously as possible, considering safety and manufacturer/supplier recommendations, but, in any case, when necessary to comply with other standards made applicable to the EGU by a permit limit or a rule other than this Subpart that require operation of the control devices.
	b. Relative to the syngas not fired in the combustion turbine of an IGCC EGU during startup, you must either: (1) Flare the syngas, or (2) route the syngas to duct burners, which may need to be installed, and route the flue gas from the duct burners to the heat recovery steam generator.
	c. If you choose to use just one set of sorbent traps to demonstrate compliance with the applicable Hg emission limit, you must comply with the limit at all times; otherwise, you must comply with the applicable emission limit at all times except for startup and shutdown periods.
	d. You must collect monitoring data during startup periods, as specified in §63.10020(a) and (e). You must keep records during startup periods, as provided in §§63.10032 and 63.10021(h). You must provide reports concerning activities and startup periods, as specified in §§63.10011(g), 63.10021(i), and 63.10031.
4. A coal-fired, liquid oil-fired (excluding limited-use liquid oil-fired subcategory units), or solid oil-derived fuel-fired EGU during shutdown	You must operate all CMS during shutdown. You must also collect appropriate data, and you must calculate the pollutant emission rate for each hour of shutdown for those pollutants for which a CMS is used. While firing coal, residual oil, or solid oil-derived fuel during shutdown, you must vent emissions to the main stack(s) and operate all applicable control devices and continue to operate those control devices after the cessation of coal, residual oil, or solid oil-derived fuel being fed into the EGU and for as long as possible thereafter considering operational and safety concerns. In any case, you must operate your controls when necessary to comply with other standards made applicable to the EGU by a permit limit or a rule other than this Subpart and that require operation of the control devices.
	If, in addition to the fuel used prior to initiation of shutdown, another fuel must be used to support the shutdown process, that additional fuel must be one or a combination of the clean fuels

	defined in §63.10042 and must be used to the maximum extent possible, taking into account considerations such as not compromising boiler or control device integrity.
	Relative to the syngas not fired in the combustion turbine of an IGCC EGU during shutdown, you must either: (1) Flare the syngas, or (2) route the syngas to duct burners, which may need to be installed, and route the flue gas from the duct burners to the heat recovery steam generator.
	You must comply with all applicable emission limits at all times except during startup periods and shutdown periods at which time you must meet this work practice. You must collect monitoring data during shutdown periods, as specified in §63.10020(a). You must keep records during shutdown periods, as provided in §§63.10032 and 63.10021(h). Any fraction of an hour in which shutdown occurs constitutes a full hour of shutdown. You must provide reports concerning activities and shutdown periods, as specified in §§63.10011(g), 63.10021(i), and 63.10031.

Proposed revisions to Rule 1.10, Provisions for Upsets, Startups and Shutdowns and Unplanned Maintenance.

Rule 1.10 Provisions For Upsets, Startups and Shutdowns, and Unplanned Maintenance.

In the event that the United States Environmental Protection Agency's regulation, 40 C.F.R. § 52, *State Implementation Plans: Response to Petition for Rulemaking: Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction*, is declared or adjudicated invalid or unconstitutional by a court of competent jurisdiction or withdrawn, repealed, revoked, or otherwise rendered of no force and effect by EPA, the U.S. Congress, or by Presidential Executive Order, then such action will render *Rule 1.10 Provisions for Upsets, Startups and Shutdowns, and Unplanned Maintenance* invalid and the original *Rule 1.10 Provisions for Upsets, Startups, and Shutdowns* will be effective immediately upon the date such action becomes final and effective.

A. Upsets

(1) For an upset defined in Rule 1.2, the Commission may pursue an enforcement action for noncompliance with an emission standard or other requirement of an applicable rule, regulation, or permit. In determining whether to pursue enforcement action, and/or the appropriate enforcement action to take, the Commission may consider whether the source has demonstrated through properly signed contemporaneous operating logs or other relevant evidence the following:

(a) that an upset occurred and the source can identify the cause(s) of the upset;

(b) that the source was at the time being properly operated;

(c) that during the upset, the source took all reasonable steps to minimize levels of emissions that exceeded the emission standard or other requirement of an applicable rule, regulation, or permit;

(d) that within 5 working days of the time the upset began, the source submitted notice to the Department describing the upset, the steps taken to mitigate excess emissions or any other noncompliance, and the corrective actions taken.

(2) In any enforcement proceeding, the source seeking to establish the occurrence of an upset has the burden of proof.

(3) This provision is in addition to any upset provision contained in any applicable requirement.

B. Startups and Shutdowns

(1) Startups and shutdowns are part of normal source operation. Emission limitations applicable to normal operation apply during startups and shutdowns unless specific emission limitations or work practice standards for startup and shutdown are defined by an applicable rule, regulation, or permit.

(2) Where the source is unable to comply with emission limitations applicable to normal operation during startups and shutdowns, the Department will consider establishing alternative emission limitations or work practice standards for startup and shutdown. The source must demonstrate that it is technically infeasible, considering its specific control strategy, to comply with emission limitations applicable to normal operation. Alternative emission limitations or work practice standards are subject to the following requirements:

(a) the alternative emission limitation or work practice standard must be specific to the source and its specific control strategy and must include the following requirements:

(i) that the source must limit the frequency and duration of startups and shutdowns to the greatest extent practicable;

(ii) that the source must be operated in a manner consistent with best operating practices at all times;

(iii) that the source must document all startups and shutdowns using properly signed contemporaneous operating logs or other relevant evidence;

(b) any alternative emission limitations or work practice standards for startup and shutdown must be established in a federally-enforceable permit.

(3) Where an upset as defined in Rule 1.2 occurs during startup or shutdown, see the upset requirements above.

C. Unplanned Maintenance.

(1) Maintenance should be performed during planned shutdown or repair of process equipment such that excess emissions are avoided. The Commission may pursue enforcement action where unplanned maintenance, if necessary to prevent or

minimize emergency conditions or equipment malfunctions, results in noncompliance with an emission standard or other requirement of an applicable rule, regulation, or permit. In determining whether to pursue enforcement action, and/or the appropriate enforcement action to take, the Commission may consider whether the source has demonstrated through properly signed contemporaneous operating logs or other relevant evidence the following:

(a) that the source can identify the need for the maintenance;

(b) that the source was at the time being properly operated;

(c) that during the unplanned maintenance, the source took all reasonable steps to minimize levels of emissions that exceeded an emission standard, or other requirement of an applicable rule, regulation or permit;

(d) that within 5 working days of the time the unplanned maintenance began, the source submitted notice to the Department describing the maintenance, the steps taken to mitigate excess emissions or any other noncompliance, and the corrective actions taken.

Appendix F

Administrative Register of Kentucky
Notice of Public Hearing
401 KAR 50:055
April 29, 1982

Administrative Register of Kentucky

LEGISLATIVE RESEARCH COMMISSION
FRANKFORT, KENTUCKY

VOLUME 8, NUMBER 10
THURSDAY, APRIL 1, 1982

IN THIS ISSUE

NOTE: The April meeting of the Administrative Regulation Review Subcommittee will be a ONE-DAY meeting—THURSDAY, April 7, 1982, at 10 a.m., in Room 103, Capitol Annex.

This is an official publication of the Commonwealth of Kentucky, Legislative Research Commission, giving public notice of all proposed regulations filed by administrative agencies of the Commonwealth pursuant to the authority of Kentucky Revised Statutes Chapter 13.

Persons having an interest in the subject matter of a proposed regulation published herein may request a public hearing or submit comments within 30 days of the date of this issue to the official designated at the end of each proposed regulation.

The *Administrative Register of Kentucky* is the monthly advance sheets service for the 1982 Edition of KENTUCKY ADMINISTRATIVE REGULATIONS SERVICE.

HOW TO CITE: Cite all material in the *Administrative Register of Kentucky* by Volume number and Page number. Example: Volume 2, Kentucky Register, page 318 (short form: 2 Ky.R. 318).

KENTUCKY ADMINISTRATIVE REGULATIONS are codified according to the following system and are to be cited by Title, Chapter and Regulation number, as follows:

Title		Chapter		Regulation
806	KAR	50	:	155
Cabinet, Department, Board or Agency		Bureau, Division or Major Function		Specific Area of Regulation

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DEPARTMENT FOR NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION
Bureau of Environmental Protection
Division of Air Pollution
(Proposed Amendment)

401 KAR 50:055. General compliance requirements.

RELATES TO: KRS Chapter 224
PURSUANT TO: KRS 13.082, 224.033
NECESSITY AND FUNCTION: KRS 224.033 requires the Department for Natural Resources and Environmental Protection to prescribe regulations for the prevention, abatement, and control of air pollution. This regulation establishes requirements for compliance during shutdown and malfunctions; establishes requirements for demonstrating compliance with standards; establishes requirements for compliance when a source is relocated within the Commonwealth of Kentucky; and other general compliance requirements.

Section 1. Emissions During Shutdown and Malfunction. (1) Emissions which, due to shutdown or malfunctions, temporarily exceed the standard set forth by the department shall be deemed in violation of such standards unless the requirements of this section are satisfied and the determinations specified in subsection (4) of this section are made.

(2) When emissions during any planned shutdown and ensuing startup will exceed the standards, the owner or operator of the source shall notify the director or his designee no later than three (3) days before the planned shutdown. However, if the shutdown is necessitated by events which the owner or operator could not reasonably have foreseen three (3) days before the shutdown, then such notification shall be given immediately following the decision to shutdown. The notice shall be in writing and shall specify the name of the air contaminant source, its location, the address and telephone number of the person responsible for the source, the reasons for and duration of the proposed shutdown, the date and time for the action, the physical and chemical composition, rate and concentration of the emissions during such shutdown and ensuing startup, the basis for determination that such shutdown is necessary, and the measures which will be taken to minimize the extent and duration of the emissions during such shutdown and ensuing startup.

(3) When emissions due to malfunctions, unplanned shutdowns or ensuing startups are or may be in excess of the standards, the owner or operator shall notify the director by telephone as promptly as possible, and shall cause written notice when requested by the director to be sent to the director. Such notice shall specify the name of the source, its location, the address and telephone number of the person responsible for the source, the nature and cause of the malfunctions, or unplanned shutdown, the date and time when the malfunction was first observed, the expected duration, the nature of the action to be taken to correct the malfunction, and an estimate of the physical and chemical composition, rate and concentration of the emission.

(4) A source shall be relieved from compliance with the standards set forth by the department if the director determines, upon a showing by the owner or operator of the source, that:

(a) The malfunction or shutdown and ensuing startup did not result from the failure by the owner or operator of the source to operate and maintain properly the equipment;

(b) All reasonable steps were taken to correct, as expeditiously as practicable, the conditions causing the emissions to exceed the standards, including the use of off-shift labor and overtime if necessary;

(c) All reasonable steps were taken to minimize the emissions and their effect on air quality resulting from the occurrence;

(d) The excess emissions are not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and

(e) The malfunction or shutdown and ensuing startup was not caused entirely or in part by poor maintenance, careless operation or any other preventable upset conditions or equipment breakdown.

(5) The director shall notify the owner or operator of the source of the determination made under this section no later than sixty (60) days after the date that all information required by this section has been submitted.

Section 2. Compliance with Standards and Maintenance Requirements. (1) An owner or operator of any affected facility subject to any standard within the regulations of the Division of Air Pollution shall:

(a) In the case of a new source, demonstrate compliance with the applicable standard(s) within sixty (60) days after achieving the maximum production rate at which the affected facility will be operated, but not later than 180 days after initial startup of such facility;

(b) In the case of an existing source, demonstrate compliance with the applicable standard before or on the date that final compliance is required by the applicable compliance schedule unless otherwise specified by regulation; and

(c) Maintain the affected facility in compliance with all applicable standards at all times subsequent to the date that compliance is demonstrated.

(2) Compliance with standards in the regulations of the Division of Air Pollution shall be demonstrated as follows:

(a) By performance tests as specified in the applicable regulation and according to the requirements and exceptions provided in 401 KAR 50:045.

(b) By methods other than performance tests as provided for by the applicable regulation.

(c) By methods acceptable to the department if the applicable regulation does not specify a performance test or other method of determining compliance.

(3) Compliance with opacity standards in the regulations of the Division of Air Pollution shall be determined by Method 9 of Appendix A of 40 CFR 60, filed by reference in 401 KAR 50:015, except as may be provided for by regulation for a specific category of sources. Opacity readings of portions of plumes which contain condensed, uncombined water vapor shall not be used for purposes of determining compliance with opacity standards. The results of continuous monitoring by transmissometer which indicate that the opacity at the time visual observations were made was not in excess of the standard are probative but not conclusive evidence of the actual opacity of an emission, provided that the source shall meet the burden of proving that the instrument used meets (at the time of the alleged violation), performance specification as required by the department, has been properly maintained and (at the time of the alleged violation) calibrated, and that the resulting data have not been tampered with in any way.

(4) The opacity standards set forth in this regulation shall apply at all times except during periods of startup, shutdown, and as otherwise provided in the applicable standard.

(5) At all times, including periods of startup, shutdown and malfunction, owners and operators shall, to the extent practicable, maintain and operate any affected facility including associated air pollution control equipment in a manner consistent with good air pollution control practice for minimizing emissions. Determination of whether acceptable operating and maintenance procedures are being used will be based on information available to the department which may include, but is not limited to, monitoring results, opacity observations, review of operating and maintenance procedures, and inspection of the source.

(6) Adjustment of opacity standards *for emissions from a stack or a control device*:

(a) An owner or operator of an affected facility may request the department to determine opacity of emissions from the affected facility during the initial performance tests. *Fugitive emissions are not subject to the provisions of this subsection.*

(b) Upon receipt from such owner or operator of the written report of the results of the performance tests, the department will make a finding concerning compliance with opacity and other applicable standards. If the department finds that an affected facility is in compliance with all applicable standards for which performance tests are conducted, but during the time such performance tests are being conducted fails to meet any applicable opacity standard, the department shall notify the owner or operator and advise him that he may petition the department within ten (10) days of receipt of notification to make appropriate adjustment to the opacity standard for the affected facility.

(c) The department will grant such a petition upon a demonstration by the owner or operator that the affected facility and associated air pollution control equipment were operated and maintained in a manner to minimize the opacity of emissions during the performance tests; that the performance tests were performed under the conditions established by the department; and that the affected facility and associated air pollution control equipment were incapable of being adjusted or operated to meet the applicable opacity standard.

(d) The department will establish an opacity standard for the affected facility meeting the above requirements at a level at which the source will be able, as indicated by the performance and opacity tests, to meet the opacity standard at all times during which the source is meeting the mass or concentration emission standard.

Section 3. Shutdown and Relocation. (1) Any affected facility commencing operations after a shutdown for six (6) months shall demonstrate compliance with the applicable standard(s) within sixty (60) days after achieving the maximum production rate at which the affected facility will be operated, but not later than 180 days after commencing operations.

(2) Any source located within the Commonwealth of Kentucky and moved to another location involving a change of address shall be subject to applicable regulations at the new location or to regulations which were applicable at the original location, whichever is the more stringent.

Section 4. Circumvention. No owner or operator subject to the provisions of the regulations of the Division of Air Pollution shall build, erect, install, or use any article, machine, equipment or process, the use of which conceals an emission which would otherwise constitute a violation of an applicable standard. Such concealment includes, but is not limited to, the use of gaseous diluents to achieve compliance with an opacity standard or with a standard which is based on the concentration of a pollutant in the gases discharged to the atmosphere.

Section 5. Prohibition of Air Pollution. No person shall permit or cause air pollution as defined in 401 KAR 50:010 in violation of regulations promulgated by the department.

[Section 6. Alternative Emission Reduction Options. (1) Applicability:]

[(a) The provisions of this section shall apply to all affected facilities within a source emitting the same or comparable pollutants which commenced before the classification date defined below and:]

[1. Are in compliance with all applicable emission limitations or on schedule with an order containing a plan and timetable for compliance issued by the department and approved by the U.S. EPA;]

[2. Are subject to a court decree in an action in which the U.S. EPA was a party or which decree the U.S. EPA has found to be satisfactory and such decree contains a schedule for compliance and allows for timely modification of the decree without delay in the final compliance date; or]

[3. Are required to meet a compliance timetable contained in a regulation in Title 401, Chapter 61.]

[(b) The provisions of this section shall not apply to affected facilities which:]

[1. Are subject to standards under Title 401, Chapter 57 or 401 KAR 63:020;]

[2. Are subject to standards of performance under 401 KAR 63:010, unless such fugitive emissions have been accurately quantified and their air quality impact predicted by methods approved by the department;]

[3. Are subject to federal new source performance standards pursuant under 40 CFR 60;]

[4. Are subject to standards established pursuant to either Title 401, Chapter 51, or standards established pursuant to 40 CFR 52.21 or 40 CFR 51 Appendix S; or]

[5. Emit or may emit fugitive soil.]

[(2) Definitions. As used in this regulation all terms not defined herein shall have the meaning given them in 401 KAR 50:010.]

[(a) "Classification date" means the effective date of this regulation.]

[(b) "Fugitive soil" means particulate matter composed of soil which is uncontaminated by pollutants resulting from industrial activity. Fugitive soil may include emissions from haul roads, wind erosion of exposed soil surfaces and soil storage piles, and other activities in which soil is either removed, stored, transported, or redistributed.]

[(c) "Permanent," as applied to shutdown of affected facilities subject to Title 401, Chapters 59 and 61, means a period of five (5) years from shutdown for complying and eighteen (18) months from shutdown for non-complying affected facilities.]

[(3) Method for determining allowable emission rate:]

[(a) A source may petition the department to establish an allowable emission rate for each pollutant subject to standards of performance under Title 401, Chapters 59 and 61 except as provided in subsection (1)(b) of this section. This source allowable emission rate may be apportioned to the affected facilities at the source subject to regulation for that pollutant without regard to the individual pollutant emission rate allowed each affected facility under Title 401, Chapters 59 and 61, provided that the conditions specified in paragraph (b) 1, 2, and 3 of this subsection are

met. Such source allowable emission rate shall be determined according to the formula given in Appendix A to this regulation.]

[(b) The source emission rate determined in paragraph (a) of this subsection may be apportioned among the affected facilities included in the procedure subject to the following demonstrations by the source owner or operator:]

[1. The applicable ambient air quality standards contained in Title 401, Chapter 53, shall be attained and maintained after the apportioning of emissions among the affected facilities. Air quality models and procedures specified in 401 KAR 50:040 shall be used, as applicable.]

[2. The ambient air quality resulting from the use of the apportioned emissions shall be equal to or better than the ambient air quality which would have resulted through compliance of each affected facility with its individual emission limitation as contained in Title 401, Chapters 59 and 61. Air quality models and procedures specified in 401 KAR 50:040 shall be used as applicable.]

[3. The allowable emission rate apportioned to any new or modified affected facility commenced on or after the classification date of an applicable standard of performance contained in Title 401, Chapter 59, shall not exceed the emission rate allowed that new or modified affected facility in that standard of performance.]

[(c) Subsequent to a successful demonstration that the requirements of paragraph (b) of this subsection have been fully met, the source owner or operator may petition the department to designate the individual apportioned emission rate as the alternate emission limitation for each affected facility under the requirements of the department. Such designation shall be in accordance with the procedures contained in subsection (5) of this section.]

[(d) At no time subsequent to the designation of the alternate emission limitations by the department, shall the owner or operator of the source allow the total emissions (in pounds of effluent per hour) from all affected facilities included in the calculation of paragraph (a) of this subsection to exceed the source allowable emission rate established under paragraph (a) of this subsection.]

[(e) At no time subsequent to the apportioning of emissions shall any individual affected facility within the source exceed the alternate emission limitation established for it under paragraph (c) of this subsection.]

[(4) Monitoring and testing:]

[(a) The department shall require such recordkeeping, monitoring of operations, continuous emissions and/or ambient monitoring as may be necessary to demonstrate to the satisfaction of the department that the requirements of subsection (3)(d) and (e) of this section shall and will be met under actual conditions of operation of the source.]

[(b) The department may require that each individual affected facility assigned an alternate emissions limitation under subsection (3)(c) of this section demonstrate compliance with the applicable alternate emission limitation through performance tests. Such tests shall be conducted using reference methods and procedures prescribed for that particular affected facility under the standard of performance applicable to it in Title 401, Chapters 59 and 61.]

[(5) Enforcement:]

[(a) The source emission rate established under subsection (3)(a) of this section, the alternate affected facility emission limitation established under subsection (3)(c) of this section, and all applicable recordkeeping, monitoring and testing requirements under subsection (4) of this section shall be identified as conditions of an order or a permit issued by the department subject to prior written approval of the order or permit by the U.S. EPA.]

[(b) The order or permit issued by the department under paragraph (a) of this subsection shall be null and void on permanent shutdown of any affected facility for which an alternate emission limitation has been established by the department under subsection (3) of this section.]

[(c) Final compliance dates contained in any order or permit issued pursuant to paragraph (a) of this subsection shall provide for the most expeditious compliance with the alternate emissions limitations contained in the order or permit, as applicable. In no case shall the final compliance date for any affected facility identified in the order or permit exceed the final compliance date for that affected facility under the applicable standard of performance contained in Title 401, Chapters 59 and 61, or under an order previously issued to the source by the department.]

[(d) Failure of a source owner or operator to comply with the conditions of the order or permit issued pursuant to paragraph (a) of this subsection shall subject the owner or operator to any or all enforcement actions provided for under 401 KAR 50:060.]

[APPENDIX A TO 401 KAR 50:055

Determination of source allowable emission rate

$$F = \sum_{i=1}^{N} E_i$$

Where:

F = source allowable emission rate in pounds per hour of a particular pollutant.

E_i = allowable emission rate contained in applicable standard of performance for the ith process or affected facility in pounds of that pollutant per hour at rated capacity.

N = total number of processes, operations, or affected facilities for which individual emission limitations apply pursuant to Title 401, Chapters 59 and 61 for the same or comparable pollutant.]

JACKIE SWIGART, Secretary

ADOPTED: March 15, 1982

RECEIVED BY LRC: March 15, 1982 at 4:30 p.m.

SUBMIT COMMENT TO: Mr. Larry Wilson, Supervisor, Development and Evaluation Branch, Division of Air Pollution Control, 18 Reilly Road, Frankfort, Kentucky 40601.

See public hearings scheduled on page 973.

DEPARTMENT FOR NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION
Bureau of Environmental Protection
Division of Air Pollution
(Proposed Amendment)

401 KAR 51:010. Attainment status designations.

RELATES TO: KRS Chapter 224
PURSUANT TO: KRS 13.082, 224.033
NECESSITY AND FUNCTION: KRS 224.033 requires the Department for Natural Resources and Environmental Protection to prescribe regulations for the prevention, abatement and control of air pollution. This regulation designates the status of all areas of the Commonwealth of Kentucky with regard to attainment of the ambient air quality standards.

Section 1. Attainment Status Designations. (1) The attainment status of areas of the Commonwealth of Kentucky with respect to the ambient air quality standards for particulates, sulfur dioxide, carbon monoxide, ozone and nitrogen oxides are as listed in Appendices A through E of this regulation.

(2) Within sixty (60) days of revision by the U.S. Environmental Protection Agency of a national ambient air quality standard, the department shall review applicable data and submit to the U.S. EPA a revision to the attainment—non-attainment list pursuant to Section 107(d)(1) of the Clean Air Act.

(3) Whenever the air quality status in Appendices A through E of this regulation has been described by the generally inclusive term "Rest of State," that portion of the state so identified shall be deemed to be designated on a county-by-county basis.

Section 2. Attainment Timetable. Primary and secondary ambient air quality standards shall be attained as expeditiously as practicable, however, primary ambient air quality standards shall be attained no later than December 31, 1982 in non-attainment areas with respect to the pollutants for which the area is non-attainment. The above date shall be extended to December 31, 1987 for ozone and carbon monoxide for those areas granted such an extension by the U. S. EPA.

APPENDIX A TO 401 KAR 51:010

ATTAINMENT STATUS DESIGNATIONS FOR TOTAL SUSPENDED PARTICULATES

Designated Areas	Does Not Meet Primary Standards	Does Not Meet Secondary Standards	Better Than Standards
Bell County	X	X	
Boyd County	X	X	
That portion of Bullitt Co. in Shepherdsville	X	X	
That portion of Campbell Co. in Newport	X	X	
That portion of Daviess Co. in Owensboro	X	X	
That portion of Henderson Co. in Henderson	X	X	
Jefferson County	X	X	
That portion of Lawrence Co. in Louisa	X	X	
McCracken County	X	X	
Marshall County		X	
That portion of Madison Co. in Richmond	X	X	
Muhlenberg County	X	X	
That portion of Perry Co. in Hazard	X	X	
That portion of Pike Co. in Pikeville	X	X	
That portion of Whitley Co. in Corbin	X	X	
Rest of State			X

APPENDIX B TO 401 KAR 51:010

ATTAINMENT STATUS DESIGNATIONS FOR SULFUR DIOXIDE

Designated Areas	Does Not Meet Primary Standards	Does Not Meet Secondary Standards	Better Than Standards
That portion of Boyd County south of the Northern UTM line 4251 Km	X	X	
That portion of Daviess Co. in Owensboro			X
Greenup County			X
That portion of Henderson Co. in Henderson			X
Jefferson County	X	X	
McCracken County	[X]		X
Muhlenberg County	X	X	
Webster County	[X]	[X]	X
Rest of State			X

Public Hearings Scheduled

DEPARTMENT FOR HUMAN RESOURCES

A public hearing will be held on April 6, 1982, at 9:00 a.m. at the Vital Statistics Conference Room, 1st Floor, DHR Building, Frankfort, on the following regulations:

902 KAR 4:020. Care of eyes. [8 Ky.R. 938]
904 KAR 1:012. Inpatient hospital services. [8 Ky.R. 939]

DEPARTMENT OF INSURANCE

A public hearing will be held on April 1, 1982, at the Department of Insurance, 151 Elkhorn Court, Frankfort, on the regulations listed below at the following times:

9:00 a.m. 806 KAR 26:010. Proxies, consents and authorization. [8 Ky.R. 926]
9:15 a.m. 806 KAR 9:170. Minimum score of examination for license. [8 Ky.R. 954]
9:30 a.m. 806 KAR 9:070. Examination retake limits. [8 Ky.R. 926]
9:45 a.m. 806 KAR 9:011. Repeal of 806 KAR 9:010. [8 Ky.R. 954]
10:00 a.m. 806 KAR 38:060. Cancellation of enrollees' coverage. [8 Ky.R. 959]
10:45 a.m. 806 KAR 2:020. Interest and rewards prohibited. [8 Ky.R. 925]
11:00 a.m. 806 KAR 17.070. Filing procedures for health insurance rates; experience data on individual Medicare supplement policies. [8 Ky.R. 955]

A public hearing will be held on May 3, 1982, at the Department of Insurance, 151 Elkhorn Court, Frankfort, on the regulations listed below at the following times:

9:00 a.m. 806 KAR 9:091. Repeal of 806 KAR 9:090. [8 Ky.R. 1130]
9:15 a.m. 806 KAR 12:070. Application requirements. [8 Ky.R. 1130]
10:00 a.m. 806 KAR 17:060. Minimum standards for Medicare supplement policies. [8 Ky.R. 1055]

DEPARTMENT FOR NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION

A public hearing will be held on April 29, 1982, at 10:00 a.m. at the 1st Floor Auditorium, State Office Building, High & Clinton Streets, Frankfort, on the following regulations:

401 KAR 50:015. Documents incorporated by reference. [8 Ky.R. 1035]
401 KAR 50:035. Permits and compliance schedules. [8 Ky.R. 1037]
401 KAR 50:055. General compliance requirements. [8 Ky.R. 1041]
401 KAR 51:010. Attainment status designations. [8 Ky.R. 1044]
401 KAR 51:017. Prevention of significant deterioration of air quality. [8 Ky.R. 1112]
401 KAR 51:052. Review of new sources in or impacting upon non-attainment areas. [8 Ky.R. 1120]
401 KAR 51:055. Controlled trading. [8 Ky.R. 1125]
401 KAR 59:018. New stationary gas turbines. [8 Ky.R. 1046]
401 KAR 59:101. New bulk gasoline plants. [8 Ky.R. 1049]
401 KAR 59:175. New service stations. [8 Ky.R. 1050]
401 KAR 59:210. New fabric, vinyl and paper surface coating operations. [8 Ky.R. 910]
401 KAR 59:212. New graphic arts facilities using rotogravure and flexography. [8 Ky.R. 912]
401 KAR 61:055. Existing loading facilities at bulk gasoline terminals. [8 Ky.R. 1051]
401 KAR 61:056. Existing bulk gasoline plants. [8 Ky.R. 1052]
401 KAR 61:085. Existing service stations. [8 Ky.R. 1054]
401 KAR 61:120. Existing fabric, vinyl and paper surface coating operations. [8 Ky.R. 913]
401 KAR 61:122. Existing graphic arts facilities using rotogravure and flexography. [8 Ky.R. 915]
401 KAR 63:031. Leaks from gasoline tank trucks. [8 Ky.R. 1129]

A public hearing will be held on May 3, 1982, at 10:00 a.m. at the Auditorium, Capital Plaza Tower, Frankfort, on the following regulations:

401 KAR 2:050. Waste management definitions. [8 Ky.R. 1002]
401 KAR 2:060. Hazardous waste site or facility permit process and application. [8 Ky.R. 1008]
401 KAR 2:063. General standards for hazardous waste sites or facilities. [8 Ky.R. 1079]
401 KAR 2:070. Standards applicable to generators of hazardous waste. [8 Ky.R. 1025]
401 KAR 2:073. Interim status standards for owners and operators of hazardous waste treatment, storage and disposal facilities. [8 Ky.R. 1108]
401 KAR 2:075. Identification and listing of hazardous wastes. [8 Ky.R. 1030]
401 KAR 2:170. Hazardous waste recycling facility permits and standards. [8 Ky.R. 1110]

PUBLIC SERVICE COMMISSION

A public hearing will be held on April 21, 1982, at 9:00 a.m. at the Public Service Commission, 730 Schenkel Lane, Frankfort, on the following regulation:

807 KAR 5:006. General rules. [8 Ky.R. 932]

Emergency Regulations Now In Effect

JOHN Y. BROWN, JR., GOVERNOR
Executive Order 82-127
February 19, 1982

EMERGENCY REGULATION
Department for Human Resources
Bureau for Manpower Services

WHEREAS, the Secretary of the Department for Human Resources is responsible for promulgating by regulation the policies of the Department with respect to the provisions of the Weatherization Assistance Program permitted through Title XXVI, Section 2605K, of the Low-Income Home Energy Assistance Act; and

WHEREAS, the Secretary has promulgated a regulation providing for the implementation of the Weatherization Assistance Program which provides for weatherization of housing units occupied by the elderly, handicapped, homebound and/or low-income persons; and

WHEREAS, the Weatherization program is designed to alleviate life and/or health threatening situations to households whose well-being within their residence is in danger because of inclement weather; and

WHEREAS, the Weatherization Assistance Program is also designed to make repair and alterations to an eligible household's residence which when complete will reduce the cost of home energy through a reduction in home energy consumption; and

WHEREAS, the time delays inherent in complying with procedural requirements of KRS Chapter 13 would preclude the effectiveness of the regulation; and

WHEREAS, the Secretary has, therefore, found that an emergency exists with respect to the said proposed regulation, and that, therefore, said proposed regulation should, pursuant to the provisions of law, be effective immediately upon filing with the Legislative Research Commission:

NOW, THEREFORE, I, John Y. Brown, Jr., Governor of the Commonwealth of Kentucky, by virtue of the authority vested in me by KRS 13.085(2), do hereby acknowledge the finding of an emergency by the Secretary of the Department for Human Resources with respect to the filing of said regulation of the Department for Human Resources providing for the Weatherization Program, and direct that said regulation shall be effective upon filing with the Legislative Research Commission as provided in Chapter 13 of the Kentucky Revised Statutes.

JOHN Y. BROWN, JR., Governor
FRANCES JONES MILLS, Secretary of State

DEPARTMENT FOR HUMAN RESOURCES
Bureau for Manpower Services

903 KAR 2:010E. Weatherization Assistance Program.

RELATES TO: KRS 194.010, 194.050
PURSUANT TO: KRS 13.082, 194.010, 194.050
EFFECTIVE: February 19, 1982
EXPIRES: Sine Die adjournment of 1982 regular session of the General Assembly, or upon being replaced through regular procedure.

NECESSITY AND FUNCTION: The Department for Human Resources is authorized by KRS 194.010 to develop and operate human services programs for the citizens of the Commonwealth which shall include all related federal programs in which the state elects to participate. KRS 194.050 authorizes the Secretary for the Department for Human Resouces to formulate, promote, establish and execute policies, plans and programs and to adopt, administer and enforce all applicable state laws and all rules and regulations necessary to protect and maintain the health, welfare and sufficiency of the citizens of the Commonwealth. To this end the Secretary shall adopt, administer and enforce such rules and regulations as are necessary to qualify for the receipt of federal funds. The Commonwealth of Kentucky has agreed to meet the requirements set forth in Section 2605(b) of the "Low-Income Home Energy Assistance Act of 1981," and accordingly, will receive a federal grant to assist eligible households to meet the costs of home energy. Included in this act (2605K) is the provision that funds may be made available to low-income persons for weatherization of residences. The regulation sets forth the eligibility criteria for participation in the Weatherization Assistance Program and defines various administrative responsibilities necessary through the act.

Section 1. Application. Each person requesting weatherization assistance shall be required to complete an application provided by the department, and the person shall provide such information deemed necessary to permit the department's agents to determine eligibility and benefit amount consistent with the criteria contained herein. The department may require proof of domicile and other pertinent considerations listed by the applicant.

Section 2. Definitions. Terms used in this regulation are defined as follows:

(1) "Energy crisis intervention" is an emergency situation brought on through adverse weather and energy supply shortage.

(2) "Household" shall include all individuals who occupy a housing unit as their legal residence.

(3) "Housing unit" shall be one (1) or more rooms when occupied as separate and distinct living and/or sleeping quarters.

(4) "Home energy" means a source of heating or cooling in residential dwellings.

(5) "Poverty level" means with respect to a household the income poverty guidelines as prescribed by the Office of Management and Budget.

(6) "Weatherization" is the act of repairing, altering or constructing items within a housing unit which when accomplished will eliminate or substantially reduce the "life or health threatening situation" to a household and/or reduce energy costs of a housing unit substantially.

(7) "Elderly person" means an individual who is sixty (60) years of age or older.

(8) "Handicapped person" means an individual who is handicapped as described in Section 7(b) of the Rehabilitation Act of 1973.

(9) "State" means the Commonwealth of Kentucky.

(10) "Life or health threatening situation" means a housing unit in a state of disrepair and/or disfunctioning of equipment or systems within the unit which causes a

NOTICE OF PUBLIC HEARING
ON
AMENDMENTS TO KENTUCKY AIR POLLUTION CONTROL REGULATIONS

The Kentucky Department for Natural Resources and Environmental Protection will hold a public hearing on Thursday, April 29, 1982 at 10:00 a.m., local time, in the first floor auditorium of the State Office Building, High and Clinton Streets, Frankfort, Kentucky. This hearing is being conducted by the Division of Air Pollution Control to receive public comments on proposed new and amended Kentucky Air Pollution Control regulations, Title 401 of the Kentucky Administrative Regulations which are part of the State Implementation Plan. The proposed regulations are listed below:

401 KAR 50:015. Documents incorporated by reference.
401 KAR 50:035. Permits and compliance schedules.
401 KAR 50:055. General compliance requirements.
401 KAR 51:010. Attainment status designations.
401 KAR 51:017. Prevention of significant deterioration of ambient air quality.
401 KAR 51:052. Review of new sources in or impacting upon non-attainment areas.
401 KAR 51:055. Controlled trading.
401 KAR 59:018. New stationary gas turbines.
401 KAR 59:101. New bulk gasoline plants.
401 KAR 59:175. New service stations.
401 KAR 59:210. New fabric, vinyl and paper surface coating operations.
401 KAR 59:212. New graphic arts facilities using rotogravure and flexography.
401 KAR 61:055. Existing loading facilities at bulk gasoline terminals.
401 KAR 61:056. Existing bulk gasoline plants.
401 KAR 61:085. Existing service stations.
401 KAR 61:120. Existing fabric, vinyl and paper surface coating operations.
401 KAR 61:122. Existing graphic arts facilities using rotogravure and flexography.
401 KAR 63:031. Leaks from gasoline tank trucks.

401 KAR 59:210, 59:212, 61:120, and 61:122 were printed in the March issue of the Administrative Register of Kentucky. The remaining regulations will be printed in the April issue of the same publication.

The full text of these regulations is filed at the locations listed below for public inspection during regular business hours. In addition individuals requiring a copy of the full text or any additional information may contact any of the Division of Air Pollution Control regional offices listed below or write or phone the Development and Evaluation Branch of the Division of Air Pollution Control, Fort Boone Plaza, 18 Reilly Road, Frankfort, Kentucky 40601, telephone number (502) 564-3382, ext. 346.

Division of Air Pollution Control
Fort Boone Plaza
18 Reilly Road
Frankfort, Kentucky 40601

Air Pollution Regional Office
311 West Second Street
Owensboro, Kentucky 42301

Air Pollution Regional Office
210 E. 10th Street
Bowling Green, Kentucky 42101

Air Pollution Regional Office
1390 Irvin Cobb Drive
Paducah, Kentucky 42001

County Clerk's Office
Henderson County Courthouse
Henderson, Kentucky 42420

Air Pollution Regional Office
7964 Kentucky Drive, Suite 8
Florence, Kentucky 41042

Air Pollution Regional Office
213 Lovern St., 2nd Floor
Hazard, Kentucky 41701

Air Pollution Regional Office
2108 29th Street
Ashland, Kentucky 41101

County Clerk's Office
Hardin County Courthouse
Elizabethtown, Kentucky 42701

County Clerk's Office
Fayette County Courthouse
215 West Main Street
Lexington, Kentucky 40507

Air Pollution Control District
of Jefferson County
914 East Broadway
Louisville, Kentucky 40201

All interested persons will be afforded the opportunity to present oral and written testimony regarding these proposed regulations. Written statements will be considered as part of the hearing record if received by the close of business on April 29, 1982 at the Division's Frankfort office. Such statements should be sent to the attention of Larry J. Wilson, Supervisor, Development and Evaluation Branch.